TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 90

JOHNNY RAY SMITH, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 19, 1957

CERTIORARI GRANTED JUNE 9, 1958

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 90

JOHNNY RAY SMITH, PETITIONER,

VS.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Proceedings in U.S.C.A. for the Fifth Circuit	a	1
Clerk's certificate re No. 15295	a	1
Record from United States District Court for the Middle District of Alabama	b	1
Waiver of indictment and consent to proceed by information as to Johnny Ray Smith, November 21, 1949	b	1
Information, November 21, 1949	c	2
Commitment as to Johnny Ray Smith, November 21, 1949	d	3
Marshal's return on commitment as to Johnny Ray Smith, November 28, 1949	e	4
Transcript of hearing on sentencing, November 21, 1949	f	4
Order on motion to vacate and set aside judgment and sentence, October 7, 1950	i	10
Motion to withdraw plea of guilty as to Johnny Ray Smith, November 29, 1950	j	10

	Original	Print
Record from United States District Court for the Middle District of Alabama—Continued		
Order denying motion to withdraw plea of guilty as to Johnny Ray Smith, December 7, 1950	n	13
Motion of defendant to be brought before the Court for trial and vacate sentence, dated March 31, 1954 and letter (dateless) from Johnny Ray Smith to Hon. Charles B. Kennamer	o	14
Notice of U.S.D.C., Northern District of California re dismissal of petition for writ of habeas corpus	y	25
Order of U.S.C.A. for the Ninth Circuit dismissing the case	z	26
Affidavit of—		
Richard Dale Nunn	aa	26
John Earle	bb	27
Lawrence R. Duncan	cc	28
William E. Alred	dd	29
Exhibit 1—Motion to dissolve heretofore had Court proceedings	ee	30
Order on defendant's motion to be brought before the Court for trial and vacate sentence	jj	34
Petition for rehearing (letter from Johnny Ray Smith to Hon. C. B. Kennamer), submitted April 14, 1954	kk	34
Order denying petition for rehearing	ll	36
Notice of appeal (letter from Johnny Ray Smith to Clerk of Court, O. D. Street, Jr.) submitted April 19, 1954	mm	36
Second notice of appeal (letter from Johnny Ray Smith to Clerk of Court, O. D. Street, Jr.) submitted May 4, 1954	nn	37
Order denying leave to proceed in forma pauperis and of certification of lack of merit	oo	37
Petition to appeal in forma pauperis	pp	38
Designation of record and statement of points on appeal	qq	39
Order of U.S.C.A. for the Fifth Circuit granting leave to proceed in forma pauperis	rr	40
Clerk's certificate (omitted in printing)	ss	
Clerk's certificate re No. 16068	tt	41
Mandate of the U.S.C.A. for the Fifth Circuit of June 21, 1955 and dated August 4, 1955	uu	41

	Original	Print
Record from U.S.D.C. for the Middle District of Alabama, Northern Division	ww	43
Transcript of proceedings in the case of United States of America vs. Johnny Ray Smith in Civil Action No. 1137-N, taken December 19 and 20, 1955	ww	43
Appearances	ww	43
Testimony of—		
Johnny Ray Smith—		
Direct	1	43
Cross	26	61
Redirect	70	94
Robert Peter Jenk—		
Direct	71	94
Cross	87	106
Redirect	106	119
Perry Calhoun—		
Direct	109	122
Cross	111	123
Richard Dale Nunn—		
Direct	112b	124
Cross	120	130
Ed Driggers—		
Direct	123	132
Cross	126	134
Redirect	128	136
Recross	131	138
Allen Spearman—		
Direct	133	140
Cross	140	145
Robert Crongeyer—		
Direct	147	150
Cross	151	153
Billy Gilbert—		
Direct	155	156
Cross	159	159
Harold Hayes—		
Direct	162	161
Cross	165	164
Tullis Easterling—		
Direct	171	168
Cross	176	171
Lawrence Horn—		
Direct	178	173
Cross	179	173
W. D. Sanders—		
Direct	183	176
Cross	185	178
A. W. Dorman—		
Direct	187	179

	Original	Print
Record from U.S.D.C. for the Middle District of Alabama, Northern Division—Continued		
Testimony of—Continued		
James W. Daughtry—		
Direct	190	181
William Arant—		
Direct	193	184
Cross	195	185
Jack Johnson—		
Direct	196	186
Cross	199	188
Barney Lisenby—		
Direct	200	189
Cross	202	190
John Lill—		
Direct	205	193
Cross	227	209
James Lewis—		
Direct	258	232
Cross	264	237
Oscar Smith—		
Direct	267	239
Cross	269	240
Dr. Claude E. Christmas—		
Direct	275	244
Cross	278	247
Reporter's certificate (omitted in printing)	285	
Clerk's certificate (omitted in printing)	285	
Caption re No. 16708	286	250
Mandate of U.S.C.A. for the Fifth Circuit of November 27, 1956 and dated February 28, 1957	287	251
Record from United States District Court for the Middle District of Alabama	289	252
Notice of appeal	289	252
Transcript of hearing held March 29, 1957, Civil Action No. 1137-N	290	253
Memorandum opinion and order, dated July 10, 1957	299	261
Minute entry of argument and submission (omitted in printing)	303	
Opinion, per curiam	304	266
Dissenting opinion, Rives, J.	306	267
Judgment, November 21, 1957	309	270
Clerk's certificate	310	270
Mandate of U.S.C.A. for the Fifth Circuit Circuit of November 21, 1957 and dated January 9, 1958	311	271
Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari	313	272

[fol. a]

IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16708

JOHNNY RAY SMITH, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

CLERK'S CERTIFICATE

I, Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit do hereby certify that the attached transcript of record is the transcript of record on former appeal entitled Johnny Ray Smith vs. United States of America, No. 15295, which was filed in the above entitled and numbered cause and which was used by this Court in the hearing and decision of said cause.

Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit.

[fol. b] IN UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

No. 1605-S

UNITED STATES OF AMERICA,

v.

JOHNNY RAY SMITH, RICHARD DALE NUNN, and ROBERT PETER JENKS

WAIVER OF INDICTMENT—November 21, 1949

Johnny Ray Smith the above named defendant, who is accused of violating 18 U.S.C. 1201(a) Transportation in Interstate Commerce from Calhoun County, Florida to Coffee County, Alabama, of Alan W. Spearman, Jr., who had been unlawfully kidnapped for the safe conduct on

said trip of the defendants being advised of the nature of the charge and of his rights, hereby waives in open court prosecution by indictment and consents that the proceeding may be by information instead of by indictment.

Johnny Ray Smith, Defendant. B. H. Lisenby, Witness.

Date: November 21, 1949

[File endorsement omitted]

[fol. c] IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

[Title omitted]

Criminal No. 1605-S

INFORMATION—Filed November 21, 1949

The United States Attorney charges:

On or about November 14, 1949, JOHNNY RAY SMITH, RICHARD DALE NUNN, and ROBERT PETER JENKS, did knowingly transport in interstate commerce from Calhoun County in the State of Florida, to Coffee County in the Middle District of Alabama, a person, to wit, Alan W. Spearman, Jr., who had been unlawfully seized, kidnapped, abducted, and carried away and held for the safe conduct of the three defendants from Calhoun County, Florida, to Coffee County, Alabama.

Hartwell Davis, Assistant United States Attorney.

[File endorsement omitted.]

[fol. d] IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

Case No. 1605-S

COMMITMENT AS TO JOHNNY RAY SMITH—November 21, 1949

The President of the United States of America—

To the Marshal of the United States for the Middle District of Alabama and to the Attorney General of the United States, Greeting:

Whereas, at the May term of said Court, 1949, held at Montgomery in said district and division, to wit on November 21, 1949, Johnny Ray Smith was sentenced by said Court upon his plea of guilty to be committed to the custody of the Attorney General of the United States or his authorized representative for and during the term and period of Thirty (30) Years; beginning on the date on which he is received for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention; or until he shall be otherwise discharged by due course of law, for violation of Section 1201(a), Title 18, U.S.C. (Kidnapping)

Now This is to Command You, The Said Marshal, forthwith to take said Johnny Ray Smith and him safely transport to said designated place of confinement and him there deliver to said warden or jailer of said designated place of confinement with a copy of this writ; and you, the said warden and jailer to receive said Johnny Ray Smith and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

Witness the Honorable C. B. Kennamer, Judge of said Court, and the seal thereof, affixed at Montgomery, in said district, this 21st day of November, 1949. O. D. Street, Jr., Clerk. By Annie Schoolar, Deputy Clerk.

[fol. e] IN UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

MARSHAL'S RETURN ON COMMITMENT AS TO JOHNNY RAY SMITH—Returned and filed November 28, 1949

I have executed the within writ in the manner following to wit: On November 21, 1949 I delivered said Johnny Ray Smith to the Jailer of the Montgomery City Jail temporarily pending transfer to the institution herein designated for the service of sentence and on November 22, 1949, I delivered said Johnny Ray Smith to the Warden of the United States Penitentiary, at Atlanta, Georgia, together with a copy of this commitment.

Benjamin F. Ellis, United States Marshal. By Benton Q. Foy, Deputy.

[File endorsement omitted.]

[fol. f] IN UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

[Title ommitted]

No. 1605-S

TRANSCRIPT OF HEARING—November 21, 1949

The Court: Young men, I am informed that you three young men are being brought before the Court on a charge of kidnapping. Do you understand that is a pretty serious charge? Any one who is charged with a criminal offense in this Court may have the advice of a lawyer if he wants the advice of a lawyer. If you want a lawyer the Court will appoint one and he would come over here and advise you about this matter before disposing of your case, and you would not have to pay him anything. The law doesn't require you to have a lawyer, you have the right to dispose of your case without a lawyer, if you understand that you may have one if you want one. You may waive that right. Now do you want a lawyer?

Johnny Ray Smith: I don't want a lawyer.
Richard Dale Nunn: I don't want a lawyer.
Robert Peter Jenks: I don't want a lawyer.
The Court: No one has promised you anything or made any threats to get you to waive that right to have a lawyer?
Defendants: No, sir.

Q. No one has told you it would be better to dispose of it here today?
A. No, sir.

The Court: The charge being brought into this court here in Montgomery against you is one you would have the right to have go before a federal grand jury and they would decide whether you should be indicted or not then if indicted you would enter plea on the indictment instead of the information. Do you want to have the case to go to the grand jury, if so, you would have to give bond or remain in jail until we have a federal grand jury and then let them pass on your case. You can waive that right if you see proper and by your consent the United States Attorney will file what we call an information and that takes the place of the indictment. It is simply a written charge of your offense. Smith, do you want to waive your right to go before the federal grand jury?
Smith: Yes, sir.

Q. Nunn, do you want to waive your right to go before the federal Grand jury?
Nunn: Yes, sir.
Q. Jenks, do you want to waive that right?
Jenks: Yes, sir.

The Court: Now, you would have the right to have your case in Dothan, and dispose of it there. That is the Southern Division of this Court. In order to dispose of it here in Montgomery you would have to waive that right to have it taken up at Dothan and consent for it to be taken up here in Montgomery, which is the Northern Division. Do you want to do that?
Smith: Yes, sir.
Nunn: Yes, sir.
Jenks: Yes, sir.
The Court: I don't know how to make it any clearer

to them. You have a right to have a lawyer if you want one. We don't want you to feel that your constitutional rights have been imposed on.

The Court: You each understand that under that charge you can be sent to the penitentiary for a long time? Do you?

Defendants: Yes, sir.

The Court: You understand what you were doing when making these waivers?

[fol. g] Defendants: Yes, sir.

The Court: Let the defendants sign the waivers.

Mr. Davis: Johnny Ray Smith, have you read that and had it explained to you by the court and you understand it?

Smith: Yes, sir.

Mr. Davis: You wish to sign it?

Smith: Yes, sir. (Signs the waiver)

Mr. Davis: Richard Dale Nunn, have you read over this waiver of indictment and you understand it?

Q. You are in agreement that I file this information against you?

Nunn: Yes, sir.

Mr. Davis: You understand it and wish to sign it of your own free will and accord?

Nunn: Yes, sir. (Signs the waiver)

Mr. Davis: Robert Peter Jenks, have you had this waiver of indictment read to you and agree to have this information filed against you, and you understand it as explained here in open Court?

Jenks: Yes, sir.

Mr. Davis: You have read over it and agree to sign it?

Jenks: Yes, sir. (Signs the waiver)

Mr. Davis: Each of you have been furnished with a copy of this charge?

Defendants: Yes, sir.

Mr. Davis: It is charged in this information that on or about November 14, 1949, Johnny Ray Smith, Richard Dale Nunn, and Robert Peter Jenks, did knowingly transport in interstate commerce from Calhoun County in the State of Florida to Coffee County in the Middle District of Alabama, a person, to wit, Alan W. Spearman, Jr., who had been unlawfully seized, kidnapped, abducted, and

carried away and held for the safe conduct of the three defendants from Calhoun County, Florida, to Coffee County, Alabama.

Q. Are you guilty, Johnny Ray Smith?
Smith: Guilty.
Q. Are you guilty or not guilty, Richard Dale Nunn?
Nunn: I am guilty.
Q. Are you guilty or not guilty, Robert Peter Jenks?
Jenks: I am guilty.

The Court: You each of you plead guilty of this information and you are aware of the fact that the Court could sentence you to life imprisonment?
Defendants: Yes, sir.
The Court: No one has promised you anything or given you any inducement to enter that plea of guilty?
Defendants: No, sir.
The Court: Have you been threatened or coerced by any one in pleading guilty?
A. No, sir.
The Court: I will say I am really amazed myself with your past criminal activities and in Smith's case particularly it is pretty bad, and not good for these other boys. How old are you, Smith?
Smith: I am twenty-six.
The Court: Are your parents living?
Smith: Yes.

Q. Where do they live?
A. In Monroe County.
Q. Do they know about your prison trouble?
A. I don't think so.
Q. Have they taken any interest in your trouble in Florida?
A. I asked them not to come. I did not want my mother there, she is in bad health.

The Court: How old are you, Nunn?
Nunn: I am seventeen.

Q. Have you had trouble in Court before?
A. Yes, sir. In Panama City.
Q. Where is your home?
A. In West Virginia.

Q. Are your parents living?

A. My mother is.

Q. Does she know about this?

A. No, sir. I don't want her to until I get my sentence.

Q. You have had trouble besides what you were in jail for?

A. Yes, sir. In the Air Force.

Q. What was that?

A. Grand Larceny.

Q. How long was the sentence?

[fol. h] A. A year and nine months.

Q. Did you escape that sentence?

A. Yes, sir.

Q. You boys were armed on this trip you made when you forced that man to drive from Florida with you?

Smith: We had a shotgun.

Q. Didn't you have an automatic?

A. Not until after we got here.

Q. How old are you Jenks?

A. I am seventeen.

Q. Are your parents living?

A. Yes, sir. They live in Minneapolis, Minn.

Q. Have you had trouble before this?

A. Yes, sir.

Q. You had trouble while waiting trial in Panama City?

A. Yes, sir.

Q. Do you want your parents to know about your trouble here?

A. Not until I am sentenced.

Q. Is there anything further you wish to say Smith, before sentence is imposed in your case?

Smith: Well, your Honor, I would like for you to take under consideration that there was no viciousness in connection with this abduction of this boy. We were nice to him and did not harm him any way and we wanted transportation and did not harm him any at all.

Q. You held him up at the point of a gun to make him bring you up here?

A. Yes, mam.

Q. You are now under sentence in Florida for five years? That case is on appeal?

A. Yes, sir. That is right.

The Court: Nunn, what were you in jail for?
Nunn: For transporting liquor.

Q. Is there anything further you wish to say?
A. No, sir.

The Court: Jenks, is there anything further you wish to say?

Jenks: No, sir.

The Court: Mr. Lill has gone over this case with me. Smith, in your case, sentence of the law that you be in the custody of the Attorney General for a period of thirty years.

Richard Dale Nunn, in your case sentence of the law you be in custody of the Attorney General for fifteen years.

Robert Peter Jenks, sentence of the law you be in the custody of the Attorney General for fifteen years. All you boys under the law are eligible for parole when you serve these sentences. I don't know whether you should be paroled. You have shown an indication that you are going to spend your lives in crime. It looks like you have dedicated your lives to crime. If you are ever going to change it is time now. You can't escape this punishment and under the circumstances I think it is moderate.

I hereby certify that the foregoing is a full, true and correct transcript of notes taken by me in said cause, this 21 day of November, 1949. Ethel M. Schneider, Official Court Reporter.

Reporter's Certificate to foregoing transcript omitted in printing.

[File endorsement omitted.]

[fol. i] IN UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORHERN DIVISION

JOHNNY RAY SMITH, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent

ORDER ON MOTION TO VACATE & SET ASIDE JUDGMENT AND SENTENCE—October 7, 1950

The Clerk of this court has presented to the court a petition forwarded to the Clerk through the United States mails, signed by Johnny Ray Smith, who was heretofore sentenced in this court to be in the custody of the Attorney General for thirty years on his plea of guilty to an information wherein he was charged with kidnapping.

The Court will treat petitioner's petition to the Court as a petition to vacate—set aside or correct the sentence, as provided for in Section 225, Title 18, United States Code Annotated.

The court has made careful examination of the files and record of the case, and the files and records conclusively show that the prisoner is entitled to no relief.

This 7th day of October, 1950.

C. B. Kennamer, United States District Judge.

[File endorsement omitted.]

[fol. j] IN UNITED STATES DISTRICT COURT FOR MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

[Title omitted]

MOTION TO WITHDRAW PLEA OF GUILTY AS TO JOHNNY RAY SMITH—November 29, 1950

To Honorable Charles B. Kennamer, Judge of the United States District Court, Northern Division, Middle District of Alabama:

May It Please the Honorable Court:

Heretofore, and on or about the 27th day of September 1950, your Petitioner herein, Johnny Ray Smith, did, as is

provided for by Statute (Sec. 2255, Tit. 28, U.S.C.A.), properly submit to this Court a Meritorious Motion to have unjust, unlawful, unauthorized judicial proceedings dissolved, forever held of no legal worth or validity, and, to grant your petitioner an hearing de novo upon the allegations now causative of his unjust, unconstitutional confinement and imprisonment.

The aforesaid motion was fullly documented, as to the facts, and was duly attested, and so verified by your petitioner.

The government interposed no objection to the grant of the relief claimed nor had it offered rebuttal to the averments made by Petitioner.

[fol. k] This Court, however, inadvertently or otherwise, overlooked the then status of the motion, and, itself, then, deliberately or otherwise, ignored the accepted verity of the claims before it, and in flagrant disregard of the patent proof showing the fraud and coercion behind the manufacture and concoction of the files and records in the case at bar, denied due and lawful relief by the acceptance of its aforesaid void proceedings as presented by the fraudulently manufactured and concocted record condemned by the Petitioner.

Herewith annexed, and made a part of this motion, is the aforesaid heretofore filed papers upon which the petitioner prayed for the due relief guaranteed to him by the constitution and the laws of the United States.

The aforesaid document is submitted, as Exhibit No. 1, in this proceeding and its contents are to be part and parcel of this action, as if set out in full herein. Also annexed herewith, as Exhibit No. 2, is the order of denial issued and filed by this Court, as of the 7th day of October, 1950.

Motion Now Made

Because this Court has utterly failed to protect the constitutional rights of the petitioner, and in effect, has ruled that a fraudulently procured record is absolute, as against proper attack made de hors the record, your petitioner herein and now reiterates liis plan for the aid and assistance of competent counsel to represent his Claims herein: further, your petitioner moves this Court to Vacate its judgment of conviction, sentence and commitment in that

the heretofore entered and filed plea of guilty by your petitioner be expunged from the records of the Court, and that your petitioner be proceeded against as law and justice provide under a plea of not guilty—Rule 32 (D) of the Federal Rules of Criminal Procedure provides for the withdrawal of a plea of Guilty.

This Statutory Rule is bedrocked upon sound reason, common sense, fairness and impartiality, as is meant by our American System of Jurisprudence.

The record (Exhibit No. 1) forcefully shows that your petitioner was coerced into entering his plea of guilty—

"The inquiry would be to fairly ascertain whether the plea was given thru ignorance, fear or inadvertence" Kercheval v. U.S., 274 U.S. 220, 475 Ct. 582; U.S. v. Colonna, 142 F. 2d 210.

[fol. 1] Further as the record shows (supra), your petitioner could well establish a defence to the accusation hurled against him—

"If this be so, there is substantial authority that he did not commit the offence to which he had pleaded guilty." Ex Parte Atkinson, 84 F. 2d. 73; Hite vs. U.S. 168 F.2d. 973; Loney v. U.S., 151 F. 2d. 1; U.S. v. O'Carter, 91 F. Supp. 544—Rule 32 (D) of the Federal Rules of Criminal Procedure.

Your petitioner has assailed the Court Proceedings causative of his unjust, unlawful incarceration by proper motion (Sec. 2255, Tit. 28, U.S.C.A.), only to meet with adverse action by the Court. To overcome this judicial bar to the vendication of his undoubted rights in law, your petitioner proceeds by way of (proper procedure) Rule 32 (D) of the Federal Rules of Criminal Procedure.

That the now made motion is proper, and is to be sustained—U.S. v. Gallagher, 183 F. 2d. 342—cannot be gainsaid, unless, by complete evasion of the Constitutional Oath taken by the Court to uphold the laws of the United States, and to deal fairly and justly with all those accused of crime.

Whereupon, your petitioner, Johnny Ray Smith, he being a citizen of the United States by Birth, and he being sorely aggrieved by a fraudulently procured plea of guilty heretofore entered in this Court, does hereby and now, upon the uncontradicted averments found in Exhibit No. 1, being

part and parcel of this motion, as if her-in set-out in full, move the Court to withdraw the aforesaid plea of Guilty, as is provided for by Rule 32 (D) of the Federal Rules of Criminal Procedure.

Further, your petitioner, he being a poor person, as is governed by the remedial provisions of Section 1915 Title 28, U.S.C.A., prays the appointment of sincere, competent counsel to represent his claims to this Court, and, to protect his rights in law, your petitioner prays to proceed herein and hereinafter as a poor person, so that the reason of his poverty will not influence this Court to arbitrarily deny proper, due and lawful relief as the moving papers merit, and as the laws of the United States so provide.

For the relief herein sought, and as justice and law provides, your Petitioner so prays,

[fol. m] Respectfully submitted this 29 day of November, 1950.

Johnny Ray Smith, Petitioner.

Duly sworn to be Johnny Ray Smith; jurat omitted in printing.

[fol. n] IN UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

[Title omitted.]

ORDER DENYING MOTION TO WITHDRAW PLEA OF GUILTY AS TO JOHNNY RAY SMITH—December 7, 1950

A motion having been filed with the Clerk of this Court by the above named petitioner to allow the withdrawal of petitioner's plea of guilty, entered in this Court on the 21st day of November, 1949, and the same having been presented to the court, and the court having considered and understood the motion and all the allegations contained therein, and the court having re-examined all the facts and circumstances attending the arrest and hearing at which the defendant entered his plea of guilty and was sentenced by the court, and the court now finds that

the allegations contained in the present motion are not meritorious nor well founded:

It is, therefore, ordered, adjudged, and decreed that the petitioner's motion to withdraw the heretofore entered plea of guilty, be, and the same is, denied.

This 7th day of December, 1950.

C. B. Kennamer, United States District Judge.

[File endorsement omitted.]

[fol. 6] In United States District Court, Middle District of Alabama, Northern Division

To: Hon. Charles B. Kennamer.

Dear Sir:

I have diligently prepared this motion under Title 28, U.S.C.A., Section 2255. The motion itself is not a masterpiece of draftmanship, but the work of an uneducated layman desperately trying to present a case that reeks with injustice.

I have for more than four years tried to get my case back before the sentencing Court where I would have an opportunity to prove my innocence.

Thus far all my efforts have been in vain. I am restrained from making any contacts with witnesses by the prison officials here.

Legal documents have been confiscated from me—I can not use the mails to correspond with people that could aid me in my fight for justice. I have no way of making hostile witnesses come forth and state the truth in my case.

My only recourse is to beg this court to recognize an injustice, and grant the relief prayed for in this motion, so that justice may be had.

Included with this motion are four (4) affidavits—Two of them do not contain the seal or official signature of a notary public. The Notary Public at this institution is Mr. Joseph B. Latimer—He would not authorize them—

If these affidavits valid testimony are contested—This court can issue the necessary authority to have these witnesses brought into Court or depositions taken.

I would like to present affidavits from witnesses other than prisoners, but I am a prisoner myself and only prisoners had an opportunity to observe my condition during my arrival and incarceration at Atlanta Federal Penitentiary on November 22, 1949. I have no attorney to aid me in my case and hope that the Court will aid and advise me in any legal matter that should be brought to my attention. I ask that this letter be considered as part of the motion now before the Court.

Respectfully yours, Johnny Ray Smith, Petitioner.

[fol. p] IN UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

[Title omitted]

Re. Crim. No. 1605-S

MOTION TO VACATE SENTENCE—March 31, 1954

To: Hon. Charles B. Kennamer, Judge of the United States District Court, Northern Division, Middle District of Alabama.

May It Please The Honorable Court:

Your petitioner herein, Johnny Ray Smith, is a citizen of the United States by birth, and, by virtue of his inherent and vested right to due process of law and the equal protection of the law, he brings this proceeding, as is provided for by Section 2255, Title 18, U.S.C.A.

The nature of this proceeding is to inquire into the cause behind and responsible for the unjust, unlawful, unauthorized imprisonment now being suffered by your petitioner, and, to have said imprisonment dissolved, as truth, justice and law require.

Basis of Motion

This Motion, arises from and bases itself upon the remedial provisions of Section 225, Title 28, U.S.C.A., authorizing a discerning search into Court proceedings, as well as behind them, so that the corrective process of the Statute (Supra) can be utilized, the purpose being, to uncover denial of Constitutional rights ordinarily hid by forms of practice, procedure and judicial process.

"It is the solemn duty of Judges upon the bench to employ vigilant eye without waiting for the suggestion of others, for the purpose of avoiding and detecting the perpetrating of a wrong which may be attempted by the instrumentality of legal form".

Fowler vs. Mayor, 26 Barb. N.Y. 263.

The facts, as shown by the record, would withstand a critical review, as to their conformity to rule and form of law, but said facts would not and could not withstand a [fol. q] searching inquiry for truth as is required by "due process of law".

In the case at bar, observance to form is evident but, that cold recorded observance of judicial requirement hides the basic unlawfulness of the proceedings had.

One—Petitioner had been seriously injured before and at the immediate time of his apprehension. Suffering from serious bodily injuries, weak from a heavy loss of blood, sick with influenza, feverish to the point of deliriousness, and being in physical pain, and under mental stress, your petitioner was not in fit or proper physical or mental condition to face or stand judicial proceedings liable to cost forfeit of his life. The facts shown that your petitioner was apprehended four (4) days after the offense with which he was charged had been committed. Petitioner was taken into Court sixty-eight (68) hours after his arrest. Petitioner was denied medical treatment for his obvious illness, and injuries, and, on request was flatly refused the undoubted right granted him by the Constitution to contact with an attorney of law, or have any visits from family or friends, petitioner was held in solitary confinement without clothing, was allowed only one thin blanket to keep warm in the unheated cell, petitioner was brusquely informed that his sole and whole chance to ever again see the light of day, was to tell the Court that he the petitioner didn't want

any lawyer, wanted to plead guilty to the charge. Further, your petitioner was flatly informed that the judge would ask him if he had been coerced or threatened to do any of the above, and that his best out was to answer in the negative.

The minutes of the proceedings had shown the foregoing, however: a search for truth by this court would destroy the technical usefulness of the minutes, as they are based on fear, violence and coercive practices."

In the case at bar, your petitioner had been browbeaten and frightened into entering a plea of guilty to a crime that he did not commit. Your petitioner was told that he would receive the death penalty unless he entered a plea of guilty, that the only possible way he could avoid the death penalty, that the only out for him, to enter a plea of guilty. Your petitioner a poorly educated farm boy did not have any knowledge of law and did not know that the [fol. r] death penalty could not be imposed in his case was put in mortal fear of his life before he agreed to enter a plea of guilty.

Your petitioner was told that the Court could not impose the death penalty unless your petitioner went to trial and was found guilty by a jury.

Your petitioner believing that his life was in danger of being forfeited, agreed to follow instructions and enter a plea of guilty, waive indictment and counsel.

> "Von Moltke v. Gillies, 332 U.S. 708, 723, 724, 68 S. Ct. 316, 92 L.Ed. 309; Johnson v. Zerbst, 304 U.S. 456, 464, 465, 58 S. Ct. 1019, 82 L.Ed. 1461; Snell v. United States, 10 Cir.
>
> 174 F. 2d, 580; Walker v. Johnson, 312 U.S. 275, 286, 61 S. Ct. 574, 85 L.Ed. 830"

Your petitioner was told that his two co-defendants would receive light sentences that would not exceed four years each or until they were of twenty-one years age and that your petitioner would receive a similar sentence.

Your petitioner, while in a groggy and befuddled mental condition, weak from his illness and injuries, was taken unfair advantage of, was deprived of his constitutional rights through trickery and fraud. A search for truth by this Court would confirm your petitioners allegations.

Your petitioner did not intelligently waive Constitutional rights to counsel, but to the contrary, your petitioner was tricked into waiving his every constitutional right.

Two—"The supersonic speed and rapidity of the proceedings had clearly shown a desire on the part of the arresting officers and the prosecutor to make away with petitioner before his recovery from the pain and shock of his injuries and illness would require a careful handling of the case. As it was, the Court in belief that justice was being done, went through the cold formalities of the law, and in so doing, may have provided a legal record, but said record is a fraudulent one when perused to the facts now shown therein, but as herein averred."

Three—"Prior to petitioner's plea of guilty in open Court, an agent of the Federal Bureau of Investigation, entered the trial Judge's private chambers, and thereupon told the trial judge that your petitioner had committed a number of crimes which had never been tested in a court of law, and that petitioner had admitted committing said crimes, had made an oral statement to that effect, said [fol.'s] agent in question was John W. Lill, the Investigative agent in the case at bar.

The crimes, agent Lill, told the Court that petitioner had commit- was the (1) attempted murder of an officer of the law, to wit one Bill Gilbert, a deputy sheriff at Panama City, Florida. (2) Burglary, of a Mr. Lemmon's home near Blontstown, Florida. (3) Stealing and transporting stolen fire-arms across a state line. (4) Stealing and transporting an automobile across a state line.

Petitioner relies upon testimony taken from a certified court reporters transcript taken in the District Court of the United States for the Northern District of California, Southern Division; See RX REL proceedings in United States of America RX REL Johnny Ray Smith, vs. E. B. Swope, Warden, United States Penitentiary, Alcatraz, California, case No. *30,396*. See agent John W. Lill's testimony on pages 76, 77, 78, 82, 83, 84, 85, 92, 93, 94, 95, 96, 99.

Excerpts complained of are as follows:

Page 76—"A. At this interview I questioned him about the harboring angle to this case and also we had this pending charge of interstate transportation of a stolen automobile, and I questioned him about that, and he informed Detective Lewis and myself that he had shot Bill Gilbert,

the deputy sheriff from Panama City, with a .44 caliber revolver . . .

Page 77

A. And he also related at that time what happened to the car, that it was taken back to a place near Hacoda and burned . . .

Page 78

Q. But he admitted it was his shotgun?

A. He admitted that it was a shotgun that he took from the farmhouse of a Mr. Lammon, near Blountstown, Florida, the day he entered . . .

Page 82

Q. This was in Open Court, Mr. Lill?

A. This was in open court.

Q. Did you discuss this matter with the judge prior to going into court?

A. No, sir, not as far as the charge is concerned, no, I didn't.

Q. The court says, "Mr. Lill has gone over this case with me".

[fol. 1] A. I say not as far as this particular case, this charge was concerned, in the prior case, the background was gone over with the Court . . .

Page 83

Q. What were the circumstances of that?

A. Well, Mr. Davis, Assistant United States Attorney, asked me about the background of the case and he suggested that maybe Judge Kennamer would like to know about it.

Q. Was this in chambers or in open court?

A. No, this was in—let's see. This was, as far the prior offense concerned, I talked with Judge Kennamer about this in his chambers . . .

Page 84

Q. How did you happen to talk to the Judge?

A. Well, Mr. Davis suggested that I talk to the Judge on it concerning the background of the defendant on the

case in Florida, and it was upon his suggestion that I talked with the Judge.

Q. Well, how long before you saw the Judge in chambers, I mean in Court, when defendant entered the plea, did you talk to the Judge?

A. Well, I am not positive it was before, Mr. Karesh —it might have been . . .

The Court Q. Well, how could it have been after? Because the Court says here, reading now in a certified copy of the transcript, "Mr. Lill has gone over this case with me. Smith in your case, sentence of the law that you be in custody of the Attorney General for a period of Thirty (30) years." Now you couldn't have gone over the case with the Judge afterwards, could you?

A. Well, that answers it, then. That is before.

The Court: All right.

Q. Well, that—was that before he entered his plea?

A. That's right.

The Court: Q. Now, all right, what did you say to the Judge and what did the judge say to you, and where did it take place and what time.

(continued on page 85)

A. It took place in his chambers prior to the appearance of Johnny Ray Smith before Assistant United States Attorney Hartwell Davis and the Judge asked me if I knew anything about this man's background, and I mentioned to [fol. u] him about the offense, in Florida . . .

Page 92

Q. Well, did you talk to the Judge in order to give him the background?

A. That's right.

Q. In relation to possible sentence?

A. That's right.

Q. That is why you were in there?

A. That's right.

Q. Now, what conversation did you have with the Judge? What did you say to him and what did he say to you, and what did Hartwell Davis say, if anything?

A. Mr. Davis asked me to let the Judge know of the background of these three defendants, and I gave him information that I had in my possession at that time.

Q. What did you say, what did he say to you?

A. As to Johnny Ray Smith, I told him what the information was that the fingerprint record reflected as to his prior convictions, and I informed him of the oral statement that Johnny Ray Smith had given me about the interstate transportation of the stolen automobile, that I requested him, that I had asked him about (continued on page 93) a few days before, And that as far as Smith was concerned, that as far as I knew, that I can recollect now, that my conversation went—thats all. As far as Nunn and Jenks were concerned, I told the Judge about them escaping from an army prison detention at Illinois, and about their going down into Florida and breaking into some houses in Panama City, and about the charge there against them for burglary, and also about interstate transportation of automobiles by those two defendants . . .

The above "Excerpts" taken from a certified Court reporters transcript contain many prejudicial accusations by agent John W. Lill. This agent claims that your petitioner gave him oral statements admitting guilty of the crimes he discussed the Court in private chambers. The above crimes were untested in a court of law. Your petitioner did not admit guilty or make oral admissions to these false untested crimes, but to the contrary. Your petitioner vehemently denies any guilt or knowledge of these untested crimes. Further, your petitioner could vindicate himself [fol. v] of said crimes should they be tested in a Court of law.

Your petitioner was overreached, taken advantaged of by these inchambers and secret accusations by agent John W. Lill.

Your petitioner did not have knowledge of these false and prejudicial accusations at the time he entered his plea in open Court nor was your petitioner granted the right to defend himself against their highly prejudicial effect upon the Court.

Agent John W. Lill's sole purpose for appearing against your petitioner in a private inchambers session, was to

prejudice the Court against your petitioner with false testimony.

The submitting of the false, untested crimes to the trial Judge behind closed doors, was sanctioned by Assistant United States Attorney Hartwell Davis.

Agent John W. Lill, and Assistant United States Attorney Hartwell Davis, conspired together to the prejudice of your uncounseled petitioner.

Your petitioner was overreached and taken advantage of when he was not permitted to cross-examine this witness John W. Lill . . .

> "The constitution give the accused the right to a trial at which he should be confronted with witnesses against him. (Reynolds vs. U.S. 145, 25 L. ed. 244)

The very substance of the Constitution preserves the right of a person accused of crime to meet a witness face to face, and subject that witness to a cross-examination.

> "A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error . . . Heard v. U. S. (255 F829)

Here, in the case at bar, one but has to scan the documentary proof presented to the Court, to see a *Prima Facie* case where your petitioner was sentenced upon the strength of assumptions, submitted to the Court by a witness appearing in a private session, behind closed doors against your uncounseled petitioner, with design as his motive . . .

> "Where trial court, following plea of guilty to burglary and robbery by uncounseled defendant and before sentence, recited prior offenses of defendant, in- [fol. w] clusion by trial Court in such enumeration of charges which did not result in convictions evidenced that defendant was either overreached by prosecutions submission of misinformation to the Court or was prejudiced by the Court's own misreading of record and Supreme Court would conclude therefrom that defendant, while disadvantaged by lack of counsel, was sentenced on basis of assumptions concerning his

criminal record which were materially untrue, and that such result, whether caused by carelessness or design, was inconsistant with due process, and therefore conviction could not stand." Townsend v. Burke, 68 Ct. 1252.

In the case at bar, John W. Lill admitted that his inchambers conversation with the Court was for the purpose of a possible sentence—see page 92, of excerpts included in this motion. If agent John W. Lill had wanted Your petitioner to receive a fair and impartial trial, why did he sneak into a private chambers and bear false testimony against your uncounseled petitioner?

"It is a fundamental right of the defendant, enshrined in the Constitution that" In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . (6th Amend.)

The record of the proceedings had, will not, can not show, where at any stage of the proceedings had, any agent or officer of the Court, stood in open Court and accused your petitioner of the false, and untested crimes complained of herein.

Your petitioner's fingerprint record was not introduced in open court, but orally submitted to the Court by agent John W. Lill, during the complained of inchambers session, where your petitioner could not ascertain its veracity.

See the Court's own words . . . Mr. Lill has gone over this case with me . . .

Motion Now Made

Your petitioner has the right to ask this court to conduct an inquiry into the proceedings causative of the unlawful imprisonment condemned. Title 28, U.S.C.A. Section 2255.

Your Petitioner stands ready to fully substantiate all his herein-made averments, to produce proof thereof, and to fully protect your petitioner in this fundamental right of his.

[fol. x] Your petitioner urges inquiry be conducted into the circumstances and conditions behind the record.

Your petitioner prays that the Court avail itself of the testimony of your petitioner and his witnesses.

Your petitioner prays that this Court forthwith, an order, mandate or necessary authority required to produce your petitioner's presence in this Court upon a date certain, so that your petitioner may prosecute his motion.

"An order to secure respondents presence in the sentencing Court to testify or otherwise prosecute his motion is necessary or appropriate." United States v. Hayman, 342, U.S. 205; U.S. v. Morgan, 74 S. Ct. 247.

Whereupon, your petitioner, Johnny Ray Smith, hereby prays for due and lawful recognition of his meritorious claims, and his rights to be heard (Fully and Properly) before final adjudication; further, that the Court grant the relief sought herein, as justice, and law require, declare the proceedings heretofore had as being void and, forthwith grant to your petitioner, a hearing in proper person or a new trial, Section 2255, Title 28, U.S.C.A.

Attached to and as part of this motion is four (4) affidavits that the Court should review.

Respectfully submitted, Johnny Ray Smith, Petitioner.

I, Johnny Ray Smith, being first duly sworn, deposes and say, that the foregoing contents of this motion are true to the best of my knowledge and belief.

Sworn to before me this 31st day of March 1954. (Seal.)

Johnny Ray Smith, Petitioner. P. R. Bergan, Associate Warden. Warden-Associate warden authorized by the Act of February 11, 1938 to administer oaths.

[fol. y] ATTACHMENT TO MOTION

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 30396-Civil

JOHNNY RAY SMITH,

vs.

W. B. SWOPE, Warden United States Penitentiary

To: Mr. Johnny Ray Smith, PMB United States Penitentiary, Alcatraz, Calif. Mr. E. B. Swope, Warden United States Penitentiary Alcatraz, Calif. United States Attorney, PO Building, San Francisco.

NOTICE

You Are Hereby Notified that in March 10, 1954, pursuant to order of the Court of Appeals, Judge Michael J. Roche signed an order in the captioned case, dismissing the petition for writ of habeas corpus.

C. W. Calbreath, Clerk, U.S. District Court.

San Francisco, California, March 11, 1954.

[fol. z] ATTACHMENT TO MOTION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13,293

Feb. 4, 1954.

JOHNNY RAY SMITH, Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California, Appellee

Smith has appealed from a judgment of the district court denying an application for a writ of habeas corpus. The District court assumed jurisdiction prior to the decision

in United States v. Hayman, infra. It appears that he is a prisoner in the United States Penitentiary at Alcatraz, California, "in custody under sentence of a court established by Act of Congress (and) is claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States. See 28 U.S.C. Sec. 2255. For Smith habeas corpus is not available, the required proceeding being a motion under 28 U.S.C. Sec. 2225 which is adequate to test the legality of his detention. United States v. Hayman, 342, U.S. 205.

The cause is remanded to the district court and ordered dismissed.

William Denman, Chief Judge. Albert Lee Stephens, Circuit Judge. William E. Orr, Circuit Judge.

(Endorsed:) Order. Filed February 4, 1954. Paul P. O'Brien, Clerk.

[fol. aa] ATTACHMENT TO MOTION

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 30396

UNITED STATES OF AMERICA ex Rel. JOHNNY RAY SMITH, Petitioner,

vs.

E. B. SWOPE, Warden United States Penitentiary, Alcatraz, California, Defendant

AFFIDAVIT OF RICHARD DALE NUNN

RICHARD DALE NUNN, being duly sworn, deposes and says:

That on November 21, 1949, I was present in the court room of the United States District Court for the Middle District of Alabama, Southern Division, with Johnny Ray Smith;

That at that time Johnny Ray Smith was in a state of mental and physical disability resulting from the injuries and privations he suffered while *alluding* arrest. I do not know if he got any medical treatment or not. He was poorly clothed.

Richard Dale Nunn.

Subscribed and sworn to before me this 11th day of Sept., 1951.

L. C. Schneider, Warden, Federal Reformatory, Chillicothe, Ohio, as authorized by Act of Congress.

(Endorsed:) Filed Sep. 26, 1951. C. W. Calbreath, Clerk.

[fol. bb] ATTACHMENT TO MOTION

COUNTY OF FULTON,
State of Georgia, ss:

AFFIDAVIT

Personally appeared before me, a Notary Public, one John Earle, who after being duly sworn, on his oath deposes and says:

My true name is John Earle. During the months of November and December, 1949, affiant was a prisoner confined in the Dothan County Jail, at Dothan, Alabama, awaiting trial in the Federal Court.

The latter part of November, one John Ray Smith was placed in a cell adjacent to affiant. To Affiant's best recollection Smith remained there approximately one week.

According to affiant's information, knowledge and belief based on conversations, observations and actions of said Smith, it was apparent Smith was in no condition to appear in Federal Court and plead lucidly to the indictment pending against him.

Affiant verily beli-ves said Smith was suffering severe mental strain. This was apparent from Smith's senseless muttering continuously to himself after pacing the floor for hours Smith exhaustedly went to sleep, only to continue in sleep his moaning and groaning.

Affiant further recollects that Smith was also physically incapacitated during the period of his confinement at the Dothan County jail. This was apparent to affiant from the manner Smith limped, even while pacing his cell. Smith constantly complained of pains in his leg and back. The clothes Smith wore were practically torn to rags. Affiant loaned Smith his clothes so he could appear in Court.

Further affiant sayeth not.

John Earle, Affiant.

Subscribed and sworn to this 14th day of September, 1951.

T. C. Kindell, Notary Public. Notary Public, Fulton County, Georgia. (Seal.) My commission expires 9-11-55.

Filed Sept. 26, 1951.

[fol. cc] ATTACHMENT TO MOTION

AFFIDAVIT

AFFIANT—LAWRENCE R. DUNCAN

Lawrence R. Duncan, being duly *sworn*, deposes and says:

On or about November 22, 1949, Johnny Ray Smith, was committed to the quarantine receiving unit at the Federal prison, Atlanta, Georgia. I was also at Atlanta, Federal Penitentiary, at that time and had occasion to observe Johnny Ray Smith's Physical and mental condition while taking showers, during meals and recreation periods.

I observed the following injuries upon the body of Johnny Ray Smith:

"A. A large discolored lump or knot behind his right ear near base of skull.

A large purplish colored bruise about the size of an adult males hand below left kidney.

A severe looking laceration in right leg 'calf' muscle.

An approximately one inch long laceration in back of head.

Several small bruises and cuts covered his back and Arms."

As to his mental condition at that time; I would say that it was very poor and incoherent. That he was suffering shock and severe injuries was apparent. He would began conversing in a normal flow of words and seem to be lucid in his conversations, then for no reason whatever, switch to an altogether different conversation or began repeating over and over his same converation.

He walked with noticeable limp for several weeks after his incarceration in prison.

I was able to detect an immensely improved mental and physical condition after he had qui-ted his nerves and received some rest.

Lawrence R. Duncan.

Subscribed and sworn before me this 31 day of March 1954.

[fol. dd] ATTACHMENT TO MOTION

AFFIDAVIT

AFFIANT—WILLIAM E. ALRED

William E. Alred being duly sworn, deposes and says:

On or about November 22, 1949, I had occasion to observe Johnny Ray Smith's physical and mental condition. It was my opinion he was suffering from shock and mental fatigue brought about for reasons unknown to affiant. I have known Johnny Ray Smith a long time before the above date and since.

He was unable to hold a sensible conversation. That is to say: He would began repeating himself over and over in our conversation.

He had lost a lot of weight and looked pale and sickly. I asked him what had happened with himself. He said that he had been hurt, and displayed a painful looking laceration in the calf muscle of his right leg. Also a large knot behind his head, near base of skull.

I noticed that his mental and physical condition improved considerably with same rest and a proper diet.

S.S. William E. Alred.

Subscribed and sworn before me this 31 day of March 1954.

[fol. ee] EXHIBIT 1 TO MOTION

UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Motion

Re: Crim. No. 1605-S

JOHNNY RAY SMITH, Petitioner

vs.

UNITED STATES OF AMERICA

On Motion to dissolve heretofore had Court proceedings upon the ground that they are void Ab Initio and In Toto, as is provided by Title 28, U.S.C.A., Section 2255.

To: Hon. Charles B. Kennamer, Judge of the United States District Court, Northern Division, Middle District of Alabama.

May It Please The Honorable Court:

Your petitioner herein, Johnny Ray Smith, is a citizen of the United States by birth, and, by virtue of his inherent and vested right to due process of law and the equal protection of the law, he brings this proceeding, as is provided for by Section 2255—Title 28, U.S.C.A.

The nature of this proceeding is to inquire into the cause behind and responsible for the unjust, unlawful, unauthorized imprisonment now being suffered by your petitioner, and, to have said imprisonment dissolved, as truth, justice [fol. ff] and law require.

BASIS OF MOTION

This motion arises from and bases itself upon the remedial provisions of Section 2255, Title 28, U.S.C.A., authorizing a discerning search into Court proceedings, as well as behind them, so that the corrective process of the Statute (Supra) can be utilized, the purpose being, to uncover denial of Constitutional rights ordinarily hid by forms of practice, procedure and judicial process—

"*It is the solemn duty of judges upon the bench to employ vigilant eye without waiting for the sug-*

gestion of others, for the purpose of avoiding and detecting the perpetrating of a wrong which may be attempted by the instrumentality of legal form." Fowler vs. Mayor, 26 Barb. N.Y. 263.

The facts, as shown by the record, would withstand a technical, or properly labeled, pharisaical review, as to their conformity to rule and form of law, but said facts would not and could not withstand a searching inquiry as is required by "due process of law."

"Due process of law", as is here envisioned, clearly means, judicial proceedings conducted in a "lawful manner," that is, the very inception of the matter in the Court must be "lawful"—meaning "The very substance of law, not just mere form, as is legal"—

"The word 'lawful' more clearly implies an ethical content than does 'legal'. The latter goes no further than to denote compliance with positive, technical, or formal rules; while the latter usually imports a moral substance or ethical permissibility." Blacks Law Dictionary, 3rd. Ed.

In the case here at bar, the minutes of the Court proceedings heretofore had would and do show a nice tech-[fol. gg] nical adherence to the law, or legality but, the circumstances behind those facts, the conditions causative of the proceedings, clearly and forcefully show open and flagrant denial and deprivation of the rudimentary requirements of "due process of law"—

". . . if any of these (general rules) are disregarded in the proceedings by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by "due process of law" Mr. Justice Field, in Hagar J. Reclamation District No. 108, 111 U.S. 701, U.S. Ct. 663; please to see the enlightening words on the subject by Goodman, J., in Ex parte Wells, 90 F. Supp. 855.

Here, in the case at bar, observance to form is evident —but, that cold recorded observance of judicial requirement hides the basic lawfulness of the proceedings had.

One—petitioner had been seriously injured before and at the immediate time of his apprehension. Suffering from serious bodily injuries, weak from a heavy loss of blood, sick with influenza, feverish to the point of deliriousness, and being in physical pain, and under mental stress, your

petitioner was not in fit or proper physical or mental condition to face or stand judicial proceedings liable to cost forfeit of his life. The facts show that your petitioner was apprehended four (4) days after the offense with which he was charged had been committed. Petitioner was taken into court sixty eight (68) hours after his arrest, petitioner was denied medical treatment, for his obvious illness, and injuries, and, on request was flatly refused the undoubted constitutional right to contact with an attorney of law, or have any visits from his family or friends, petitioner was held in solitary confinement without clothing, was allowed only one thin blanket to keep warm in the unheated cell, petitioner was brusquely informed that his sole and whole chance to get proper medical treatment and to ever again see the light of day, was to tell the court that he (petitioner) didn't want any lawyer, wanted to waive indictment, and wanted to plead guilty to the charge. Further, your petitioner was flatly informed that the judge would ask him if he had ben coerced, or threatened to do any of the above, [fol. lih] and that his best out was to answer in the negative.

The minutes of the proceedings had show the foregoing. However, a search for truth by this Court would destroy the technical usefulness of the minutes, as they are based on fear, violence and coercive practices.

Two The untimely speed and rapidity of the proceedings had clearly show a desire on the part of the arresting officers and the prosecutor to make away with petitioner before his recovery from the pain and shock of his injuries and illness would require a careful handling of the case. As it was, the Court in belief that Justice was being done, went through the cold formalities of the law, and in so doing, may have prepared and provided a legal record, but said record is a fraudulent one when perused to the facts not shown therein, but as herein averred.

Motion Now Made

Your petitioner has the right to ask this Court to conduct an inquiry into the proceedings causative of the unlawful imprisonment condemned. (28 U.S.C.A. Sec. 2255.)

Your petitioner urges this lawful inquiry be conducted into the circumstances and conditions behind the record — that is, just mere judicial assumption of the legality or the

correctness of it's record would not and could not satisfy the requirements of due process of law, and the statutory provisions of Sec. 2255.

Your petitioner stands ready to fully substantiate all his herein made averments, to produce proof thereof, and to fully protect your petitioner in this fundamental right of his, he prays that this Court appoint an attorney to represent his claims, to give recognition to the claims herein urged, and fully substantiated by proof de hors the record. Further, your petitioner prays that the Court avail itself of the testimony of your petitioner, and his witnesses, as is in accordance with our American concept of fairness and impartiality in judicial hearings.

Whereupon, your petitioner, Johnny Ray Smith, hereby prays for due and lawful recognition of his meritorious [fol. ii] claims, and his right to be heard (fully and properly) before condemnation, further, that the Court grant the relief sought herein, and in the interest of truth, justice, and law, declare the proceedings heretofore had as being void and, forthwith grant to your petitioner, as justice and law require, a new trial, (Sec. 2255, Title 28, U.S.C.A.)

Respectfully submitted this day of September 1950.

Johnny Ray Smith, Petitioner.

I, Johnny Ray Smith, being first duly sworn, depose and say, that the foregoing contents of this petition are true and correct to the best of my knowledge and relief.

Johnny Ray Smith, Petitioner.

Sworn before me this 27 day of September 1950.

P. J. Madigan, Associate Warden, Alcatraz, California. Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, indicate that Johnny Ray Smith is a citizen of the United States.

[fol. jj] IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

Criminal No. 1605-S

JOHNNY RAY SMITH, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent

ORDER OF THE COURT ON PETITIONER'S MOTION—April 8, 1954

This court is not required to entertain a second or successive motion for similar relief on behalf of the same prisoner. (Title 28, United States Code, Section 2255.)

This court, therefore, declines to entertain the motion of the above named petitioner, which motion was received in the United States mail by the Clerk of this court on the 7th day of April, 1954, this court having previously considered a motion for similar relief on behalf of this same prisoner.

This 8th day of April, 1954.

C. B. Kennamer, United States District Judge.

[File endorsement omitted.]

[fol. kk] IN UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

PETITION FOR RE-HEARING

To: Hon. C. B. Kennamer.

Re. Crim. No. 1605-S

DEAR SIR:

I received your order declining to hear my motion on April 8, 1954.

I wish this letter to be regarded as a petition for a re-hearing on the motion you declined to hear.

As your order stated—your are not compelled to hear a second or successive motion for similar relief—nevertheless, the statute does not say that you are powerless to hear a second or successive motion which contains many new allegations and violations of due process of law that the first motion did not contain.

In my second and latest motion I alleged violations of due process that I did not have knowledge of when I filed my first motion under Section 2255, Title 28, U.S.C.A. I also incorporated in my second and latest motion four (4) affidavits supporting the allegations contained in the motion—plus testimony taken from a habeas corpus hearing that was had since the first motion was filed in your court. This is entirely new evidence and should be heard since a flagrant violation of due process of law and constitutional violations are evident on the face of the motion.

The second and latest motion is not a similar motion to the first motion. It alleges new and documented proof of a gross injustice now being suffered by your petitioner. The motion merits a hearing—

> See United States v. Hayman, 342 U.S. 205; Davis v. United States, 210 Fed. 118; United States v. Morgan, 74 S. Ct. 247.

Your petitioner prays that the Court re-consider his meritorious motion and grant the relief sought therein as justice and law require.

Respectfully submitted this 14th day of April 1954.

Johnny Ray Smith, Petitioner.

[fol. ll] IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—April 19, 1954

The above named defendant's petition for a re-hearing on the order of this court filed herein on April 8, 1954, having been considered and understood by the court:

It is the order of this court that the petition for a re-hearing, filed in this Court this day, be, and the same is, denied.

This 19th day of April, 1954.

C. B. Kennamer, United States District Judge.

[File endorsement omitted.]

[fol. mm] IN UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

NOTICE OF APPEAL—Filed June 25, 1954

To: Mr. O. D. Street, Jr., Clerk of Court.

Re. Crim. No. 1605-S

DEAR SIR:

In the event that the Court declines to recognize my letter of April 14, 1954, asking for a re-hearing on the Court's decision or refusal to hear my motion on April 8, 1954, I wish this letter to be regarded as a notice of appeal to the Fifth Circuit Court of Appeals.

Please let your records show that Petitioner appeals.

Respectfully yours, Johnny Ray Smith.

Submitted this 19th day of April, 1954.

Received by U.S. Mail April 26, 1954 but not filed. Delivered to U.S. Judge same day.

[File endorsement omitted.]

[fol. nn] IN UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

SECOND NOTICE OF APPEAL—Filed June 25, 1954

Re. Crim. No. No. 1605-S

To: Mr. O. D. Street, Jr., Clerk of Court.

DEAR MR. STREET:

Upon the order of the above court denying a hearing on my motion of April 8, 1954, and a request for a rehearing on April 19, 1954, denying my motion to Vacate or correct sentence under Sect. 2255, Tit. 28 U.S.C.A., I now submit my *Second Notice of Appeal* to the fifth circuit court of appeals. I appeal the Courts order of denial of April 8, 1954 and order denying a rehearing on April 19, 1954.

I am enclosing the sum of $5.00 as your fee for filing this notice of appeal—I do not know if I owe you the fee as I have already sent you one $5.00 filing fee. The statute does not call for a filing fee on a motion filed under Sect. 2255, Tit.28,U.S.C.A.—If not due please return to me as I am short on funds.

Respectfully submitted, this 4th day of May, 1954.

Johnny Ray Smith.

Received by U.S. Mail May 9, 1954, O. D. Street, Jr., Clerk.

[File endorsement omitted.]

[fol. oo] IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

[Title omitted]

ORDER DENYING LEAVE TO PROCEED IN FORMA PAUPERIS AND OF CERTIFICATION OF LACK OF MERIT—July 7, 1954

It being known to the Court that notice of appeal has been filed in this court by said defendant on June 25, 1954, and petition to prosecute said appeal in forma pauperis

having been filed in this court in support thereof on July 7, 1954,

I hereby Order, as provided for in Section 1915, Title 28, United States Code, Annotated, sub-section (a), Second Paragraph thereof, that said appeal may not be taken in forma pauperis and hereby certify that there is no merit in his appeal and that it is not taken in good faith.

This the 7th day of July, 1954.

C. B. Kennamer, United States District Judge.

[fol. pp] In United States District Court, Middle District of Alabama

[Title omitted]

Petition to Appeal In Forma Pauperis—Filed July 7, 1954

To: Honorable C. B. Kennamer, Judge of the United States District Court, Middle District of Alabama.

The aforenamed petitioner, Johnny Ray Smith, hereby swears that he is a citizen of the United States of America by birth, that he is a poor person, as defined by the appropriate governing law, (Section 1915, Title 28, U.S.C.A.) and is unable to pay the cost of an appeal. He must pray the indulgence of this Court to allow him to prosecute his meritorious cause of action in forma pauperis.

Whereupon your petitioner hereby prays leave to appeal this Courts order of denial, dated April 8, 1954—rehearing denied April 19, 1954, which dismissed a motion to vacate judgment filed under Sect. 2255, Tit. 28, U.S.C.A.

Respectfully submitted this 1st of July, 1954.

Johnny Ray Smith, Petitioner.

I, Johnny Ray Smith, hereby duly sworn, do depose and say, that the above affidavit is true to the best of my knowledge.

Johnny Ray Smith.

[File endorsement omitted.]

[fol. qq] IN UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF ALABAMA

Re. Crim. No. 1605-S

UNITED STATES

vs.

JOHNNY RAY SMITH

DESIGNATION OF RECORD AND STATEMENT OF POINTS ON APPEAL—Filed July 7, 1954

Petitioner designates the entire record in the matter of his motion to vacate judgment denied April 8, 1954, Rehearing denied April 19, 1954.

Statement of Points

1. The Court's order of April 8, 1954, denying Petitioner's motion to vacate Judgment was an abuse of discretion.

2. The Court's order of April 8, 1954, denying Petitioner's motion to vacate Judgment, rehearing denied April 19, 1954 was violation of the letter and spirit of the ruling of United States Court of Appeals, Fifth Circuit in the case of Hallowell v. United States 197, Fed. 926.

Submitted this 1st day of July, 1954.

Johnny Ray Smith, Alcatraz, California.

[File endorsement omitted.]

[fol. rr] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. —

JOHNNY RAY SMITH, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Middle District of Alabama

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS—September 3, 1954

Before Hutcheson, Chief Judge, and Rives, Circuit Judge

On Consideration of the petition filed by appellant, Johnny Ray Smith, for permission to prosecute his appeal in this Court in the above entitled cause in forma pauperis,

It Is Ordered that said appellant be, and he is hereby, granted permission to prosecute his appeal in this court in forma pauperis, and that the Clerk of the District Court of the United States for the Middle District of Alabama furnish three (3) typewritten copies of the record on appeal in this case,

It Is Further Ordered that the time for filing the transcript of record in this Court be extended to and including the 15th day of October, A.D., 1954.

(Signed) Richard T. Rives, U. S. Circuit Judge.

(Original filed—September 3, 1954.)

New Orleans, Louisiana, September 3, 1954.

[fol. ss] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. tt] IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16708

JOHNNY RAY SMITH, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

CLERK'S CERTIFICATE

I, Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit do hereby certify that the attached transcript of record is the transcript of record on former appeal entitled Johnny Ray Smith vs. United States of America, No. 16068, which was filed in the above entitled and numbered cause and which was used by this Court in the hearing and decision of said cause.

Edward W. Wadsworth, Clerk, United States Court of Appeals for the Fifth Circuit.

[fol. uu] IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The President of the United States of America

To the Honorable the Judge of the United States District Court, for the Middle District of Alabama, Greeting:

Whereas, lately in the United States District Court for the Middle District of Alabama, before you, in a cause between United States of America, plaintiff, and Johnny Ray Smith, defendant, Criminal No. 1605-S, wherein the order of the District Court entered in said cause on the 8th day of April, A.D. 1954, was in favor of plaintiff, United States of America, and against defendant, Johnny Ray Smith, as by the inspection of the transcript of record of the said District Court, which was brought into the United States Court of Appeals for the Fifth Circuit, by virtue of an appeal sued out by Johnny Ray Smith, agreeably to

the act of Congress in such case made and provided, fully and at large appears.

And Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and fifty-four, the said cause came on to be heard before the said United States Court of Appeals, on the said transcript of record, and was argued by counsel:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for a hearing under Section 2255, Title 28 U.S.C.A.

"Thomas, District Judge, Dissenting".

June 21, 1955.

[fol. vv] You, Therefore, Are Hereby Commanded that such execution and further proceedings be had in said cause as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the 4th day of August, in the year of our Lord one thousand nine hundred and fifty-five.

John A. Feehan, Jr., Clerk U.S. Court of Appeals for the Fifth Circuit.

[Endorsed:]. No. 15295. United States Court of Appeals for the Fifth Circuit, October Term, 1954, Johnny Ray Smith, Appellant, vs. United States of America, Appellee. Mandate.

[fols. ww-xx] IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, MONTGOMERY, ALABAMA

Civil Action No. 1137-N

Before Honorable Frank M. Johnson, Jr.

UNITED STATES OF AMERICA

vs.

JOHNNY RAY SMITH

Transcript of Proceedings—December 19, 20, 1955.

APPEARANCES:

Hon. Hartwell Davis, Esq., Hon. Robert Verner, Esq., U. S. District Attorney, Montgomery, Alabama.

Hon. William B. Moore, Jr., Attorney for Defendant, Rushton, Stakely and Johnston, Bell Building, Montgomery, Alabama.

Ethel M. Schneider, Official Court Reporter.

[fol. 1] The Court: The matter set for hearing this morning is on the amended motion of Johnnie Ray Smith, it having been filed in this court under Title 28, Section 2255. Mr. Moore, are you ready to proceed?

Mr. Moore: Yes, your Honor.

The Court: What says the Government

Mr. Davis: We are ready.

The witnesses were sworn and the rule was requested.

JOHNNIE RAY SMITH, first witness, called in his own behalf, being duly sworn, testified as follows:

Direct examination.

Mr. Moore:

Q. State your name, please sir.

A. Johnnie Ray Smith.

Q. Are you at the present time a prisoner in the federal penal system?

A. Yes, sir.

Q. Where are you being held at this time?

A. In the Montgomery County Jail, Montgomery, Alabama.

Q. Where were you brought from for trial, for this trial?

A. Alcatraz, California.

Q. Are you the Johnnie Ray Smith who filed a motion 2255, under Title 28, U. S. Code, Annotated, requesting this hearing?

A. Yes, sir, I am.

Q. Were you incarcerated in the County Jail in Panama City, Florida on November 22, 1949?

[fol. 2] A. Yes, I was.

Q. Did you break out of that institution?

A. I did.

Q. Please tell the Court in your own words how and under what circumstances that happened?

A. Well, we sawed a hole through the wall, a steel wall, and went out into another cell, and then we went into a corridor. We cut a bar out of a window from that corridor and went out of the window and over a fence.

Q. Who all went out of the window?

A. Myself and two other fellows.

Q. Who were they?

A. Robert Peter Jenks, and Richard Dale Nunn.

Q. Who went out first?

A. I am not sure of that, I think it was Mr. Jenks.

Q. Who was the last man out?

A. I was the last man out.

Q. What floor of the jail were you on?

A. I believe it was the third floor. The basement was setting partially above the ground. From the basement up was the third floor.

Q. What means was used to lower those first men to the ground?

A. We had made a rope out of bed ticking and mattress covers, first one thing and another.

Q. Did anything unusual happen between the time they got down and you started down?

A. Yes, they went out first, I was a little too large to get through the hole. I had to use water and soap to slick [fol. 3] myself up, so I could get through and then I slipped and fell.

Q. Did you receive any injuries on the way down?

A. Yes, I hit a ledge or something on the way down, and I struck an object on the ground that hurt my back and busted my head open.

Q. What happened to you then, if anything?

A. Well, I was knocked unconscious. I believe that my back hit the ledge I am not sure, maybe it was a casement window, I don't know, but I know I hit an object there that hurt my back. When I hit the ground my head struck a piece of stone or a brick or something and I was knocked unconscious; when I came to, the two fellows were trying to help me regain consciousness and help me to get on my feet. I was in a daze at that time and it was quite some time before I got reorganized. I never did remember getting over this 12 foot fence. I don't know how I got over it.

Q. What happened after that?

A. We left there, and we picked up an automobile about a quarter of a mile from there. We were forced to abandon that car about forty or fifty miles from there.

Q. What caused you to abandon this automobile?

A. Two highway patrolmen were overtaking us there, and we had to abandon the car and take to the woods.

Q. Who all were with you at the time?

A. Mr. Jenks, and Mr. Nunn.

Q. Do you know where you were in Florida?

A. I was between Wewahitchka, and Blountstown, Florida.

Q. What was the nature of the terrain where you abandoned the automobile?

[fol. 4] A. It was in the dead lakes area, that is the way it is commonly known, it is more or less the Everglades of Florida. It was swampy. One place was mud all over and the next place would be several acres in saw-grass.

Q. Did anything unusual happen at the time you abandoned the automobile?

A. Yes, when we left the car I was still rather groggy at the time but I recall hearing the State highway patrolmen fire a number of shots and I assumed it was the highway patrolmen, they fired several shots and hollered "Come out of there."

Q. Were you out at that time?

A. Yes.

Q. Did the three of you leave the locality, then?

A. The two boys who were with me, they were fleeter on their feet than I was, they got some distance away, and then they came back and helped me up. They asked if I had been hit, and they helped me get away.

Q. What was the climate at that time?

A. It was in November, in West Florida, it was pretty chilly at night. It was not too cool, it was getting pretty chilly late at night.

Q. What clothing did you have on?

A. I had on a suit, coat and a pair of pants, just about like I am dressed at the present time.

Q. How were the other boys dressed?

A. I believe one had on a sport shirt and a small windbreaker jacket, and a pair of slacks. The other boy was dressed about the same.

Q. In other words nobody had a top coat?

A. No, sir.

[fol. 5] Q. Was there any water in the swamp?

A. Yes, plenty of it. Shortly after we left there, I don't know how long, sometime between the time we abandoned the automobile and the next day they had the blood hounds after us.

Q. Did you hear the hounds?

A. Yes, sir. I could hear them, and I assumed they were after us.

Q. You thought the blood hounds were after you?

A. Yes. They stayed there pretty consistently.

Q. How were you traveling at the time?

A. Walking, running, crawling, to try to get away from the dogs we went in the swamp.

Q. Did you get wet all over during the process?

A. Yes, I stayed muddy and wet all during the race. Two and a half to three days.

Q. What was your physical condition at that time?

A. I had received a severe blow on the back of my head. My left kidney was awful painful, I was loosing blood in my urinal stream. My back was wrenched. I was hurt pretty bad.

Q. Was it painful to walk?

A. Yes, it was, I could barely walk. I had a severe gash here in my right leg.

Q. During part of that time were you given assistance by the other two people with you?

A. Yes, continually.

Q. Did you have blankets or food out there with you?

[fol. 6] A. No, sir. Just the clothes on our backs.

Q. How many days did you stay in the swamp?

A. From the night of the 12th until the afternoon of the 14th. I believe it was.

Q. Did you have any other way of knowing that you were being hunted at that time?

A. Well, other than the dogs I noticed there were an awful lot of airplanes in the air. I noticed them mostly at night. I am not sure of that but they were circling that area out there.

Q. Did you travel during the day or night?

A. We traveled all the time.

Q. Did it rain any time during that period?

A. Yes, it did. Along about the second day it drizzled and rained all night and most of the morning. All night of the 13th and part of the 14th.

Q. As I understand your testimony, you were in the swamp until about the 15th, were you not?

A. No, until the afternoon of the 14th, I believe it was.

Q. Did you have anything to eat during the time you were there?

A. One time we picked up a little terrapin, a small turtle; we sawed his shell off and barbecued him. But it was just a small bite apiece, it was something to chew on.

Q. You say you barbecued him, did you have any condiments, salt or barbecue sauce?

A. No. We just built up a little fire and roasted him over the flames.

Q. Did you eat that?

[fol. 7] A. I tried to eat it, my throat had got sore on me and my mouth was crack-up, I had an awful cold and tonsilitis, I chewed it up for a while and that was all I could do with it.

Q. When you came out of the swamp, about where were you then?

A. We were near Blountstown, Florida. We had circled a large area there. I don't know where we went. I don't believe any of us knew where we were. We had seen no signs of habitation there for some time, we were just running.

Q. When did you see any habitation at all?

A. We came out about six or seven miles from where we went in. It was on the night of the 13th that we came within a short distance of some farm house there. We knew there were dogs barking, and we stayed away from there, on the 14th we were able to see a few houses scattered about, you know,

Q. Did any of you ever approach any of these houses?

A. Yes, we were near there and one of the fellows with me, went up to a house there and he got some food and a shotgun, a blanket or two.

Q. Did you eat any of the food?

A. I don't remember eating anything at all.

Q. What was the condition of your mouth then?

A. It was parched up and scratched up and I was feverish, I didn't want anything to eat. I wanted water or coffee or something of that type, but I hadn't eaten anything. I don't think I ate anything at all. I am not sure.

Q. Were you picked up in Geneva, Alabama on November 18, 1949 by the Federal Bureau of Investigation, what is your answer to that question?

[fol. 8] A. Yes.

Q. During the balance of that time, were you constantly out of doors, or in a motor vehicle?

A. Yes, out of doors.

Q. Did you spend the balance of the nights while you were out on escape out in the open and exposed to rain?

A. Yes, sir.

Q. Did it continue cold during that time?

A. Yes.

Q. Did it rain during that time?

A. I believe one night about the 16th about daybreak it stopped.

Q. On the 16th were you still hiding out in that part of the country down near the swamp?

A. We were on the swamp but we were on the Florida-Alabama line on the Pea River swamp, just a few miles from where I was arrested.

Q. How did you get from that locality over to the point where you were arrested?

A. We walked part of the time, and used a boat for a few miles, just a little skiff boat for three or four miles.

Q. ——

A. From where we were hiding out to where we were arrested, I would say somewhere in the neighborhood of 25 or 30 miles.

Q. How long did it take you to make the trip?

A. About three and one-half days.

Q. Were you aware during this time that you were being searched for?

A. Yes, I was very much aware of it.

[fol. 9] Q. Now, you have already testified as to dogs and airplanes you thought were trying to spot you, were there any newspapers that you saw during that time?

A. No, sir. Not that I recall.

Q. How else did you know you were being searched for?

A. I just knew I was being sought for, you don't just break out of jail without somebody searching for you.

Q. Were you constantly trying to be on the alert to spot people who were searching for you?

A. Yes. A number of times we met people that were fishing and we made a wide detour around them.

Q. When did you go under the Osceola Hotel, in Geneva.

A. On the night of the latter part of the 17th or the first part of the 18th. I didn't have a watch, but it was around midnight. I knew it was late.

Q. Had you lost any weight?

A. Yes, I had. I had lost a great amount of weight. I did not check it on the scales. I would say I lost around 25 or 30 pounds.

Mr. Varner: We object to that as conclusion.

Mr. Moore: When you went under the Hotel, who was still with you?

A. Mr. Jenks and Mr. Nunn.

Q. Now, when were you arrested?

A. On the afternoon of the 18th.

Q. From the time from the 12th up to the 18th, what food did you have?

A. I don't recall having any food other than that turtle and I think I drank some condensed milk and chocolate or

coca cola or something of that kind. That is all the food [fol. 10] I remember.

Q. What was the condition of your mouth at that time?

A. It was dry and parched, and my throat was swollen up so I could hardly swallow.

Q. What was the condition of your hip and back and leg?

A. On my back and on my foot and leg was a mass of bruises, I could barely walk, I had to limp, and I had a severe headache, I had severe pains in my head and roaring in my right ear.

Q. Had you had eight hours sleep each night after your escape?

A. No, sir. I had slept very little. From the 12th to the 14th I hadn't slept a wink.

Q. How about the rest of the nights?

A. On the night of the 18th I had dozed a few times.

Q. I am asking you about up to the 18th, prior to your capture?

A. I dozed several times but as far as sleeping I had no restful sleep all during that time we just catnapped.

Q. Have you ever had the flu?

A. I believe I had it then.

Q. Do you think your condition was such you had the flu then?

Mr. Davis: Your Honor, I object.

The Court: Overrule the objection.

Mr. Davis: We except.

Mr. Moore: Go ahead, when were you arrested at the hotel?

A. On November 18, 1949.

Q. About what time of day was it?

[fol. 11] A. Off hand, I would say around 1:00 or 1:30 o'clock.

Q. In the day or night?

A. In the afternoon.

Q. About dinner time?

A. Yes.

Q. Where were you carried when arrested?

A. First, when I came out from under the hotel, I was shook down and carried on into a room on the second or third floor.

Q. What did the shake down consist of?

A. They removed my coat and shoes and hat.

Q. Was that all at the time?

A. I believe it was.

Q. Where were you carried then?

A. Up to the room on the second or third floor.

Q. What took place there?

A. I was interrogated for, I would say, around an hour, in regard to the commission of this crime I was charged with.

Q. Who was there at the time of the interrogation?

A. I don't know. There were several highway patrolmen, the sheriff of Geneva County and several FBI officers. I did not know their names.

Q. Who led the interrogation?

A. Mr. Lill.

Q. Who is Mr. Lill?

A. He is the FBI Agent in the case.

Q. What was the nature of the interrogations at that time?

[fol. 12] A. They asked me about the kidnapping and about whether these two fellows were with me and where they were living at, and who had harbored us, and numerous other questions. I don't recall exactly all of them.

Q. Were all these questions pertaining to the kidnapping?

A. That and where these two fellows were hiding at, and about these fellows they thought had harbored us.

Q. Were you offered anything to eat at that time?

A. Yes, I believe they brought up a plate and some coffee. I recall drinking some coffee at that time, I don't think I ate any food. I do recall drinking the coffee.

Q. After that interrogation where were you taken then?

A. I was taken before the United States Commissioner at Dothan, Ala.

Q. Who was with you there?

A. Mr. James R. Lewis, Chief of Detectives at Dothan, Ala. and Mr. Easterling, FBI Agent, and Mr. Lill, FBI Agent.

Q. Do you remember what the Commissioner told you or advised you, or what kind of conversation you had with the Commissioner?

A. The best I can remember he asked me to charge I was arrested for and he set my bond at $10,000 and asked me if I could make bond, a postpaid bond. I told him no. I was taken from there to jail and locked up.

Q. About what time of day was that?

A. I would say it was around 4:00 or 4:30 in the afternoon, somewhere in that neighborhood.

Q. Who carried you to the jail?

A. Mr. Lewis, Mr. Easterling, and Mr. Lill.

[fol. 13] Q. What jail was it you were locked up in?

A. The Houston County Jail, at Dothan, Alabama.

Q. Where were you placed in that jail?

A. I was taken back to a little wing in the back of the jail. They had solitary cells, isolated. I was placed in one of these cells.

Q. What did you have in the way of bedding?

A. I had a mattress and one blanket, that is all I had. I had my shorts on but no other clothing. They had removed my other clothing.

Q. Who removed your clothing?

A. Mr. Lill and Mr. Lewis.

Q. Did they give you any other clothing?

A. No, sir, not at that time.

Q. This was late Friday afternoon?

A. Yes.

Q. When were you next interrogated?

A. I was interrogated that afternoon, by Mr. Lill, after they locked me up. I assume——

The Court: What you assume is not material.

Defendant: They left and came back about an hour and a half to two hours later. Mr. Lill questioned me in the neighborhood of four or five hours.

Q. Where?

A. In a little interrogation room in the jail.

Q. Did you have any clothes on while being interrogated?

A. Yes, I borrowed a pair of pants from a boy in the [fol. 14] cell, the next cell, by the name of John Earl.

Q. When were you next interrogated?

A. The next afternoon, I believe it was.

Q. That would be Saturday, November 19, 1949? Is that correct?

A. Yes, sir.

Q. Was Mr. Lill present at each and every interrogation?
A. Yes, sir.

Q. Do you remember what he questioned you about then?

A. At each interrogation, the whole thing was, the pattern of the whole interrogation was, the first was in regard to this kidnapping charge, and harboring, the next day they questioned me about a little bit of everything that had happened in that part of the country for several months prior to my arrest.

The Court: Did he question you at that time about any crimes you had been charged with in Panama City, Florida, and the vicinity of Panama City?

A. I believe that was on Sunday night. That was exclusively in connection with a robbery charge and attempted murder down there, and numerous other charges down there that Mr. Lewis thought he would like to have cleared up and about a revolver he had in his possession there. He questioned me about some burglaries that happened around Dothan and he showed me some pictures of some fellow that was wanted, and he was trying to locate there. He told me if I could help him locate that particular fellow he would make a deal with me and so forth and so on.

Q. Who told you that?

A. John Lill.

[fol. 15] Q. Did Mr. John Lill talk to you on Sunday the 20th?

A. Yes, that was the afternoon of the 20th. After the conversation on the 19th was about the kidnapping and the rest of the interrogation had no bearing whatever on this kidnapping charge. It was entirely on other charges about which he had asked me on Sunday afternoon to go up and plead guilty. I had talked to him and told him I had desired to stand trial. He told me I would be foolish to stand trial and to go up and try to fight the case. That I didn't have a chance. If I did go up and try to fight the case that I would probably get the death penalty. And he promised me if I would enter a plea of guilty I would receive a very nominal sentence not to exceed ten years. That he would talk to the Judge or whoever he was going to talk to and try to get a sentence to run concurrently with my Florida sentence, if I would plead guilty.

Q. Did he discuss with you what your co-defendants were doing?

A. He told me my co-defendants were juveniles and by law they could not receive but about four years until they reached their majority, until they were 21 years of age. He said I could not get the same sentence but he would assure me I would not get over ten years, and he would try to get that to run with my sentence in Florida.

Q. Were you charged with robbery and tried by a jury, and convicted of robbery which allegedly occurred in Bay County, Florida on or about July 29th, 1949?

A. Yes.

Q. Was that sentence on you at the time of your escape?

A. Yes.

[fol. 16] Q. Were you ever accused of any attempted murder in connection with that particular crime?

A. I understood we were indicted for it but it was later nol prossed.

Q. Did you shoot anybody at that time?

A. No, I did not.

Q. When did you ever advise Mr. Lill that you desired to plead guilty?

A. Only after he had assured me that I would receive a very nominal sentence and that my two co-defendants would not receive but four years and after telling me that if I stood trial I would get the death penalty, and if I plead guilty the most I could get would be life, I agreed to plead guilty.

Q. Did he at that time advise you that both of the co-defendants were going to plead guilty?

A. Yes.

Q. Did you see your co-defendant during that period?

A. No, not until we came to Montgomery to enter our pleas. I saw them over at the Marshal's office.

Q. Did you see anybody in the Houston County jail?

A. No one except this fellow in the next cell, an inmate being held next to me was the only one I recall seeing.

Q. The police officer was questioning him?

A. That is right.

Q. When were you brought to Montgomery?

A. On November 21, 1949. Mr. Lewis and Mr. Lill came up there just about day break I believe it was.

Q. Before I go into that, what was your physical condition [fol. 17] while you were incarcerated in jail, up to the time you were deported from there in the early morning hours of November 21, 1949?

A. I was in a very poor physical condition. I had been running a fever there. I was hurting all over. I have a terrific headache. I asked for a doctor on numerous occasions there and never had been able to get one.

Q. Who did you ask for a doctor?

A. I asked Mr. Lill for a doctor a couple of times, he wouldn't get one.

Q. What did he say?

A. He told me he didn't care anything about my physical condition, as far as he was concerned I could lay down and die.

Q. Did you ask any one else?

A. I asked the jailor there. I believe his name was Dorman. I understand that he tried to get me a doctor but was unable to do so, he told me he tried to get a doctor.

Q. Did you receive any medical attention at all while you were in jail?

A. No.

Q. Did you ever receive any medical attention while incarcerated in Atlanta.

A. No. Not until November 25.

Q. Who brought you up?

A. Mr. J. R. Lewis, Chief Detective in Dothan, Mr. Lill, and some other gentleman, I didn't know his name.

Q. Had you seen Nunn and Jenks prior to the time you left them at the Hotel until you arrived in Montgomery?

A. No, sir.

[fol. 18] Q. When you arrived in Montgomery, where were you taken?

A. To the Marshal's office; that is where I met Jenks and Nunn, in the Marshal's office.

Q. Did you have any difficulty in walking?

A. I had a severe limp and walking was very painful.

Q. Did you have trouble in keeping up with the other people?

A. They didn't rush me too much. They had leg irons on me and hand cuffs on and they knew I couldn't walk very fast.

Q. When you got to the Federal Bureau of Investigation, were you then taken back to the Marshal's office?

A. Yes.

Q. How long did you remain in the Marshal's office before——

A. I would say about an hour and a half.

Q. Did you have any conversation with any one in the Marshal's office at that time?

A. No, sir.

Q. Didn't you talk to either of the co-defendants?

A. Yes, I did talk to my co-defendants then.

Q. Where were you taken then?

A. To Mr. Davis' office.

Q. Mr. Hartwell Davis' office?

A. Yes.

Q. What transpired there, if anything?

A. He talked to us.

Q. What did he tell you?

[fol. 19] A. I don't remember the exact conversation. I remember he had some papers he wanted us to sign. I believe he read Title 18, Section 2255 or something to us on kidnapping offense. I believe he read that to us.

Q. Did he discuss the case with you?

A. He asked about this fellow Wooten and asked us if we would identify him. And he told us how mad the Judge was going to be if we didn't.

Q. Was Mr. Hartwell Davis the Assistant U. S. Attorney at that time?

A. I believe he was.

Q. How much formal education have you had, Mr. Smith?

A. I quit high school in the 8th grade.

Q. Had you had any other formal education up until the time you appeared in court on November 18, 1949?

A. No, sir.

Q. Did you sign any papers in Mr. Hartwell Davis' office?

A. I believe I signed some papers there.

Q. Do you remember what was in the papers?

A. I do not recall.

Q. Did anybody explain to you what was in these papers?

A. I am not sure. I think it was some sort of venue in the territory.

Q. Where were you carried next from Mr. Davis' office.

A. Into this court room.

Q. What transpired in this court room at that time?

A. Well, I was asked how I wanted to plead. If I pleaded guilty.

Q. Do you know who was on the bench?

A. Judge C. B. Kennamer. I said I plead guilty.

[fol. 20] Q. I will ask you if during these proceedings were you told the charge against you?

A. Yes, I was told it was kidnapping.

Q. Were you advised as to the possible sentence on these offenses?

A. I don't remember being advised.

Q. Were you advised by the Court as to possible sentence you could receive?

A. Mr. Varner: We object to this, it is not the best evidence.

The Court: If it has to do with his recollection I will admit it.

Mr. Moore: Were you advised as to the possible sentence you might receive?

A. I was told I could receive a very long sentence, a very long time.

Q. You don't recall of being told the possible sentence you could receive?

A. No, sir.

Q. I will ask you if you were advised as to the possible range of allowable punishment, what was the most and what was the least you could get.

A. No.

Q. Did the judge at any time advise you as to your possible defenses to the charges?

A. Not as I remember.

Q. Did he ask you if you had a lawyer?

A. Yes, sir.

Q. What was your answer? When he asked you if you had a lawyer?

A. I told him no.

Q. Did he ask you if you had money to pay for a lawyer?

[fol. 21] A. I don't remember that.

Q. Did he advise you that the Court would furnish you a lawyer if you didn't have the money to pay a lawyer?

A. Yes, sir.

Q. Did he advise you as to your rights and discuss with you any circumstances in mitigation of the offense?

A. Come again with that.

Mr. Davis: We object to the question in that form.

Mr. Moore: I will revise the question. While you were here. I will ask you if the Judge at the time of the sentence while you were here that day while before the bench, if the Judge advised you that you had the right to bring out any matters in mitigation (mitigation means lessening the punishment). Did he advise you of that right?

A. No, not to my knowledge.

Q. Did he discuss it with you? Seeking mitigating circumstances of the case.

A. I believe the only thing I recall is his asking me if I had been made any threats or promises. That is all I recall.

Q. Did the Judge ask you if you understood the information against you?

A. I believe he did.

Q. Did he ask you if you entered the plea voluntarily?

A. Yes.

Q. Had you been advised by anyone how to answer these questions?

A. No, but I believe he asked if any threats or promises had been made to me.

Q. Had you been advised by any one as to how to answer those questions.

[fol. 22] A. Mr. Lill had told me before I came up here that Judge would probably ask me these questions and it would be to my benefit to answer in the negative. So I told him no.

Q. Did you ever discuss your case with anyone other than Mr. John W. Lill, Jr.?

A. No, if I understand you.

Q. How to conduct your case, your defense?

A. No, he never did.

Q. How long were you before the Court when you were brought in here?

A. I would say in the neighborhood of fifteen or twenty minutes.

Q. After that, where were you taken then?

A. Taken back to the Marshal's office and held there until after lunch, and then I was removed to the City Jail.

Q. While you were in the Marshal's office did you have any further conversation with Mr. John W. Lill, Jr.?

A. Yes, sir. He came back to the Marshal's office and I called him over and talked to him a few minutes.

Q. What was the nature of that conversation?

A. I asked him what happened to the ten year sentence I was supposed to receive. He said to me, "Well, you can't go around over the country shooting officers of the law and expect to get away with it." He threw up his hands and walked away.

Q. Did you make any further comments on it then?

A. Not to him, I spoke to the U. S. Deputy Marshal there. I asked him if there was any way I could institute an appeal, [fol. 23] or take any actions to set the sentence aside, to get the plea set aside. He told me he didn't know.

Q. Were you being tried at that time for shooting anyone?

A. No, sir.

Q. Were you advised by Mr. Lill that that had anything to do with your sentence?

A. That was the impression that he gave me.

Mr. Varner: We object to his impression.

The Court: I sustain that objection.

Mr. Moore: We don't want your impression, what did he say?

A. He said you can't go around over the country shooting officers and expect to get away with it. He threw his hands up and turned and walked away.

Q. Mr. Smith, a moment ago I asked you a number of questions, if the Judge advised you as to certain things. I ask you the same question that I asked you, I ask you if anybody advised you, or if you had personal knowledge of these things?

Mr. Davis: What things.

The Court: I sustain that, if it is an objection.

Mr. Moore: I will ask you if any agent of the Federal Bureau of Investigation or any other person advised you of the statutory offenses included in this charge?

Mr. Varner: On which charge?

Mr. Moore: The charge under which the information sets out.

The Court: Is the information you are talking about, Mr. Moore, the one to which he entered a plea of guilty on November 21, 1949?

[fol. 24] A. Yes, sir.

The Court: Overrule the objection.

Mr. Moore: Did you ever discuss with any officers of the FBI, or any other person, the statutory offenses included under the charge as set out in the information?

A. I believe I discussed it with Mr. Hartwell Davis, in his office.

Q. Did Mr. Davis, or anyone else advise you as to the possible defenses to those charges?

A. No, sir.

Q. Did he discuss the right to mitigate the sentence, or the circumstances in mitigation of the sentence with you?

A. Not that I remember.

Q. Did he explain to statute to you after he read it to you?

A. No, sir. As I recall it he read the statute to us, that is as far as I remember.

Q. I will ask you when you were brought to Montgomery, and during this proceeding up here, what was your mental and physical condition at that time?

A. Physically I was very sore and bruised and beat up. My mental condition, mentally I was groggy. I didn't know whether I was going or coming. I didn't have my wits about me.

Q. At that time had you regained your mental composure after your exposure for six days?

A. No, I had not.

Q. Where were you raised, Mr. Smith?

[fol. 25] A. Down in Monroe County, Alabama, partly in Birmingham. I have lived just about all over the state. Primarily my education started in Birmingham. I lived in Monroe County about nine years and I lived in Birmingham about five or six years. The rest of the time I have been here and there.

Mr. Moore: The witness is submitted to cross examination.

Mr. Moore: We do hereby introduce the entire civil and criminal record in this entire case, all proceedings that have been held up to this time.

We have also further agreed, your Honor, to offer at this time and both parties are agreeable to it. The record

Mr. Varner: This is a portion of the medical report from the Atlanta Penitentiary, and from the outset

Mr. Moore: It is all we have at this present time. Mr. Varner has the other on the way and it will be introduced by agreement when it arrives.

The Court: That will be admitted and marked as Exhibit No. 1.

Mr. Varner: We have further the reporter's transcript of the case. This is in the District Court of the United States, Northern District of California, hearing on petition for habeas corpus, I would like that marked Exhibit 2 for the Government.

The Court: It will be admitted without question.

Mr. Varner: We would like to introduce and marked the Appeal Record as Governments Exhibit no. 3.

Received in evidence and marked Government's Exhibit No. 3.

Mr. Moore: With leave of the Court we hereby offer this as Movant's Exhibit No. 1. (File on proceedings that took place in this Court on November 21, 1949, separate file, [fol. 26] which is the criminal aspect of the proceedings of the court.)

Cross-examination.

Mr. Varner:

Q. Now, Mr. Smith, if you will, tell us again and in detail about falling exactly where you were injured in your fall from the jail?

A. Do you see these scars here.

Q. Would you say that was the inside calf of the right leg?

A. Yes, sir.

Q. Now where else were you injured?

A. Back of my head, right along in here. (Demonstrating.)

Q. Do you have a scar there?

A. Yes, sir.

Q. Would you show that to the Court please, sir.

A. You can see the scar here your Honor.

Q. Where else were you injured?

A. On my left kidney, and on my back.

Q. Now, what was the condition of that injury? Was that a cut?

A. No, it was, I must have hit on some object on the ground. It caved in my kidney, and wrenched my back.

Q. Would you call that a bruise?

A. Yes, I had very severe bruises.

Q. Were there any other injuries to you?

A. Minor cuts and abrasions.

Q. Where were they?

A. On my arm and back and on my side.

[fol. 27] Q. Did you expell any substance from your nose or mouth, to indicate that your head was injured any way?

A. I had the nose bleed there periodically for some two months after that.

Q. How often did you have them during those first five days or six days when you were at liberty?

A. I don't recall how often. I do know that night about 2:00 o'clock I had a nose bleed, it lasted approximately one hour or an hour and a half, just dripping.

Q. Do you remember which night that was?

A. That was the night of the 12th.

Q. That was the night that you broke jail?

A. Yes.

Q. Did you have any place on you that was bleeding on the night that you were taken in custody?

A. My leg was bleeding.

Q. Your leg was bleeding. Now, was there any blood on or about your clothing?

A. Yes, there were spots all about.

Q. You say spots, what size spots would you say?

A. All along on my leg, and some on my lapel, on the inside of my shirt.

Q. In other words it was not a spot or two, it was a great deal of blood stains on your coat?

A. It was very noticeable, yes, sir.

Q. Now, you stated you were dressed when you broke jail, about like you are now. That is after you got out of jail and got your clothes back on?

[fol. 28] A. Yes, sir. I mean I had on a suit and coat, different color, of course.

Q. And your accomplices, the boys that broke out with you, were dressed in sport shirts?

A. To the best of my ~~memory, yes, sir.~~ One had on a wind breaker and a sport shirt, as to the best of my memory.

Q. Did the other one have on anything over his sport shirt?

A. No, but later on he acquired a coat.

Q. Do you know how he acquired that coat?

A. That is not for me to say.

Q. Well, I am asking you to say.

A. I couldn't say how he acquired the coat.

Q. You don't know how he acquired the coat?

A. Technically speaking no, I don't know.

Mr. Moore: Your Honor, we object.

The Court: He is asking him what he knows about it. Overrule objection

Mr. Varner: Did you say whether you knew or not?

A. I would say no. I don't know.

Q. Now, you stated, I believe, that you caught a little turtle, or terrapin or something of that sort. When did you catch it?

A. The best I recall it was the morning of the 14th.

Q. That was on the day, as you recall it, the same day that you held up Spearman?

A. I would say it was in the morning of the 14th.

Q. Now, you say at that time, you were unable to swallow.

A. I say that my throat was very sore and it was difficult [fol. 29] for me to swallow.

Q. You didn't swallow the terrapin?

A. No.

Q. Did you have any other food up until the 14th?

A. No. None whatever.

Q. I believe there is some testimony that one of the boys broke into a house there, on or before the 14th, and acquired a gun, did he get any food?

A. He acquired a shotgun and a hund of meat perhaps, a piece of bacon or salt port, or something.

Q. He did bring some food back with him?

A. Yes.

Q. Do you remember whether there was any other food or not?

A. No, sir; I don't.

Q. And you said, I believe, that that was on the morning of the 14th?

A. Yes; I said it was on the 14th. I don't know whether it was morning or in the afternoon. I think it was in the morning.

Q. Now, as you were coming out of the jail, I believe that you testified that you had to strip to get through the window, the hole in the window?

A. Yes, sir.

Q. How were you planning to get down, from the window down to the ground.

A. I had a rope made out of the bed clothes and things, but the bars had been cut at a slight angle, there was a spear about two or two and a half inches from the intersection there where the bars meet, it was rather sharp and I was trying to go through there sideways, and it was scratching me in the side. So I took this string here that I had and wrapped it around——

[fol. 30] Q. This string, clear that up if you will?

A. This rope we had to go down.

Q. Was that a regular rope or bed clothes tied together?

A. It was bed clothes tied together to make a rope or whatever you may call it, to go down on. I had wrapped that spearing with that in order to cover up that place where it would not hurt my side, I was going through it and a couple of fellows inside were helping to push me.

Q. You were the first then of the three defendants to go through the window?

A. No, sir. I was third. There were two other fellows there; in the jail that didnt leave.

Q. Were they also in the cell with the three of you?

A. Yes; sir there were five of us in there.

Q. In the same cell?

A. Yes, sir.

Q. Who were the other two fellows?

A. Oscar Buck Smith, and Sherman Henry Donovan.

Q. They were pushing you?

A. Yes, sir.

Q. And you went out the window?

A. Yes, sir.

Q. Now, from there, tell me what happened?

A. I took this rope and my hands were already slick with this soap, I took this rope and I had wrapped around that stub, and I started to put my weight on it, it jerked off that little nub, and it jerked me off the rope.

[fol. 31] Q. At that time, when that rope first slipped, as you put it, you were jerked off the rope, what position were you in? Were you leaning over this way, or sideways or how were you?

A. I was leaning back against the wall, I was going to hold the rope and walk down the wall.

Q. So that your back was out away from the jail?

A. Roughly, I think it was, I am not sure of that.

Q. And you had not hurt yourself up to that time?

A. No, sir.

Q. You testified that you hit something on the way down?

A. To the best of my recollection I hit something. I am not sure what it was, whether it was a ledge or cable, I don't know what it was.

Q. In view of the fact that your feet were against the wall and your hands braced on the rope, at this angle, your feet were pushing you back, you still testify that you hit a part of the jail building going down, is that correct?

A. That was the way I was going to try to get down, when the thing slipped off, I tried to hold on to it, and I almost made it, if my hands hadn't been slick I would have held it. But when I went back.

Q. You testified I believe that you were jerked loose from the rope while ago, that is not so?

A. I tried to hold on to the rope and it slung me loose, that sudden drop swung me loose from it.

Q. How far did you drop? It couldn't have been more than five or six inches could it? When the rope came loose from the stub?

A. I would say about an eighteen inch drop.

[fol. 32] Q. Now, you testified I believe that one of the boys went away and got this gun, you knew that he went in that house, didn't you?

A. I can say he left and came back with a gun, as far as actually seeing him go in the house, I did not see him go in the house.

Q. You made a statement when you went into the Atlanta Penitentiary, did you not, regarding the crime.

A. Not as I recall.

Q. Well, let me read you that part of the alleged statement to which I refer, and perhaps refresh your recollection.

Mr. Moore: Is this a signed statement?

Mr. Varner: This is not a signed statement. It is part of the record from the Atlanta penitentiary, which has already been introduced in evidence.

Mr. Moore: We object, if it please the Court, unless he says who took it.

The Court: You may question him, overruled.

Mr. Varner: I am going to take you from that part of your alleged statement where you say, and I quote directly from the alleged statement: "We left the car on the highway near Blountstown, when a State Patrol car chased us." You remember that part of your testimony a while ago, do you not?

A. Chased us?

Q. Yes, He was about to catch you and you had to abandon the car?

A. Well, I will have to clear that up for you.

Q. I will be glad to have you do so.

A. We were heading in one direction and the Highway Patrol was heading in the other direction. As we passed [fol. 33] them they started to stop, so we went to turn around, and naturally they did turn around to give us chase, and this car we had was in very poor condition so we put it on the side of the road and abandoned it.

Q. Well, I will read again that statement. "We left the car on the highway near Blountstown, when a State Patrol car chased us." That is the way it was worded there?

A. That is the sense of the wording, yes.

Q. "We jumped out of the car and stayed in the woods until about 10:00 the next morning. We came out of the woods and saw a car coming down the road, I covered the driver with a shotgun——

Mr. Moore: I object to any testimony, any questions at all about the offense of kidnapping on the grounds that this man is now under oath, giving sworn testimony, any statements made heretofore had not been under oath that this testi-

mony which he gave could—possibly be used against him in a future trial, in the vent that the motion is good.

The Court: Your objection is overruled.

Mr. Moore: We except.

Mr. Varner: "I covered the driver with a shotgun that I had stolen from a negro's house. I took him and his car both to Elba, Alabama, where we put him out about three miles from Elba, and instructed him that we would leave the car about a mile down the road." And I ask you if you remember having made that statement?

A. I certainly don't.

Q. You do not. You are saying now, that this is not a part of your statement made to anybody in Atlanta?

[fol. 34] A. I say that I don't remember ever making a statement like that in Atlanta.

Q. Do you remember ever having made a statement like that?

A. No, I don't.

Q. Do you remember that you kidnapped Allen W. Spearman?

Mr. Moore: We object to that. He read it in the record awhile ago, and The Court let it in because it is already in the record. We object——

The Court: He asked him what he remembers, it has to do with his recollection. Overrule your objection.

Mr. Varner: I believe he made the allegation in his petition that he did not kidnap Allen W. Spearman. I believe on that ground we would have a right to go into it.

Mr. Moore: If the Court please, he is not being tried for kidnapping at this time.

Mr. Varner: I say again did you or did you not kidnap one Allen W. Spearman down there on November 14th in Florida?

A. I say that I did not violate any Federal——

Q. Now, are you saying under oath——

A. I say that I did not violate any federal laws, any federal kidnap laws. That is my contention.

Q. That is your contention?

A. Yes, sir.

Q. Now tell me exactly what you did do? in regard to Allen W. Spearman.

A. I claim that he was not kidnapped in violation of the Federal Statute.

Q. I am not trying to get at what you claim, I am trying to get the facts. What, exactly what happened. Did you go there with a gun?

[fol. 35] A. Am I forced to answer that, your Honor?

The Court: Yes. He is asking you what you did between the 12th and 18th of November, 1949, is that correct, Mr. Varner?

A. Yes, sir.

The Court: Answer the question?

A. Yes, sir. I stopped him.

Mr. Varner: How did you stop him?

A. With a shotgun.

Q. And what did you do then?

A. I forced him to get over in the car. I told him to slide over. He said, "Yes, sir."

Q. Then what did you do?

A. I got in the car and I believe I got in the back seat, the best I can remember,

Q. Let me interrupt you just a minute. Were Nunn and Jenks with you then?

A. Yes, sir.

Q. Go ahead.

A. What, that was it.

Q. What else did you do? What happened after you got in the car.

A. Well, we were coming to Alabama, and we had to have the use of his automobile, and we regretted stopping him but we had to stop him. And we told him, as far as him, we didn't have any objection to him getting out, if he wanted to get out. The only thing we wanted was his automobile. And he wanted to know what we were going to do with his car. We told him when we get where we are going we are going to abandon the car and let it go. We [fol. 36] just wanted to get out of the state of Florida. He said he would like to have his car. He said it was not his car but belonged to his company and he was responsible for it, and he said I would like to have my car back. I said in other words, you would like to go along and get your

car when we get where we are going? He said if you boys are not going to harm me, yes. I said we are not going to harm you unless you attack us or something of that kind. That was the gist of the whole thing. We didn't force him to do that he could have gotten out of that car at any time. The only thing is he went along to get his automobile back.

Q. Let me interrupt that chain of thought just a second. You stated a while ago that you finished the eighth grade in school.

A. I didn't make that statement. I said I discontinued my schooling in the eighth grade.

Q. Now, where did you go to school?

A. I went to school, I started out with Cunningham in Birmingham,

Q. Was that the first grade?

A. Yes, sir.

Q. What part of Birmingham is that in, the Eastern part?

A. It is East Birmingham.

Q. Is that Woodlawn?

A. No, that is East Birmingham, that is out between Avondale and East Birmingham.

Q. What grade did you go through there?

A. Just as far as I know, I was a child about the first or second grade,

[fol. 37] Q. Where did you go after that?

A. I went to Ollie, Alabama.

Q. Where is Ollie?

A. It is down in South Alabama. A little town, in Monroe County.

Q. How long did you stay there?

A. I went there until I was in the fifth grade. I went from there to Excel.——

Q. What County is that in?

A. Monroe County.

Q. What grade did you attend there?

A. The sixth grade and seventh grade.

Q. Where did you take your little bit of eighth grade training?

A. At Mount Pinson, Alabama.

Q. You were just a child when you were in Birmingham in the first and second grades?

A. That is right.

Q. Have you been back to Birmingham to make any associations since then?

A. Yes, sir. I really have.

Q. Now, we want to get back to your statement that you told Mr. Spearman, that you simply wanted the use of his car and you could either put him out there, or you could take him with you. He voluntarily went with you, that is the way you put it, isn't it?

A. Yes.

Q. Had your ever known Mr. Spearman before?

[fol. 38] A. I believe I had seen him before around Dothan. As to being personally acquainted with him, I was not.

Q. I believe in the testimony of the California case, there was some testimony that you had known him before. Let me read you that testimony. This is the testimony from the District Court in California, page 18 of the Court proceedings. I read you here: "The Witness: My mind was—I was very confused at the time of that trial. The Court: You weren't confused when you picked up this boy, were you? The Witness: Well, the point that I am trying to stress is that I was trying to protect the boy because he did me a favor. The Court: Did you know the boy before? Witness: Yes, sir." Now, again, on Page 53. That was you testimony there, was it not?

A. Reading from the transcript there, it must have been. I don't recall the statement. I will let the transcript go as sufficient, can't contest it.

Q. Now, on Page 50, there was some discussion regarding whether or not you would have to testify, and you asked, "Am I supposed to answer that, your Honor?". And the Court said, "Yes." And they said, "Tell us what you did, where you met this man, what you did with him? You have already been convicted of that. That isn't going to hurt you on that proceeding if any?" This is your answer: "Well I am contending that it was not voluntary. That the plea of kidnapping the man was—the fact that I did not want to return to Florida custody, and another thing, that I didn't want to put the man in the middle for doing me a favor." Did you testify to that?

A. Yes, sir.

Q. Well, explain to this Court what you meant by saying

[fol. 39] you didn't want to put him in the middle for doing me a favor?

Mr. Moore: We object to that if the Court please. Let the record speak for itself.

The Court: Overrule the objection.

Mr. Varner: Just what did you mean?

A. In a sense of the word, I, at that particular time had fought the case. They were fixing to fire the boy, that was my understanding, they wanted to arrest him in the first place, and with all the eloquent promises that I had had, my contention——

Q. Just a second. By eloquent promises, you mean those promises you were telling us about a while ago?

A. Yes, sir.

Q. All right.

A. I didn't believe that I was going to be affected by any plea of guilty, anyway, that I was not going to be harmed by it, not more than ten years and it to be run concurrently.

Q. Did Spearman ever do you any favor, other than what you have told us here today?

A. He did us a favor by, well, he didn't knock us, he didn't rough ride us in any way.

Q. What do you mean by rough-riding, in view of the fact you had a 16 gauge shotgun, holding it on him. I withdraw the 16 gauge, and in view of the fact there were three of you there. What do you mean by rough-riding you?

A. He never knocked us in any way.

Q. What do you mean by knocking you in any way? Did [fol. 40] didn't give you any trouble?

A. He didn't give us any trouble, he didn't harm us, or he didn't say that we mistreated him in any way. We got along very nicely, there was no animosity towards the fellow, and he went across, he didn't have to go, he could have gotten out at an time. The shotgun that you speak of was laying down in the seat behind, the gun was not pointed at the fellow.

Q. You stopped him with the gun, did you?

A. I stopped him, I had the gun in my hand when I stopped him, yes. And that was the only time that gun was ever pointed at him.

Q. Then there was no favor from Spearman except his going along with you, after you told him to let you have the car, he could go or not, that was the favor that you referred to?

A. That is right.

Q. Well, after you got into Alabama, did he buy you any gas, or anything of that sort?

A. Yes, he bought gas, I don't know whether it was in Alabama or whether it was in Florida.

Q. Do you remember where you brought that gas? Was it a country store?

A. Yes, it was right on the Alabama-Florida line, somewhere along there.

Q. That place was open?

A. Yes, sir.

Q. It was a little store like you see in the country that sells gasoline cold drinks, cheese crackers, groceries?

A. Yes, sir, it was a little grocery store, I remember the place.

[fol. 41] Q. You had been in the woods how long then, without food?

A. About three days.

Q. Did Mr. Spearman buy you any food?

A. No, sir.

Q. Did you buy any food?

A. No. We bought a coco-cola, or ginger ale, or something like that.

Q. Were you able to drink that?

A. Yes, sir.

Q. You didn't get anything to eat?

A. No, sir.

Q. Spearman had money and he was footing the bills?

A. I don't know whether he was footing the bills or not.

Q. Well, he paid for the gasoline and drinks?

A. I think that he did, I am not sure.

Q. You didn't have any money, did you?

A. Yes, I did.

Q. But, you didn't buy any groceries, even though you had been in the woods three days without food.

A. No, we didn't. Didn't anybody get out to go in the store.

Q. Well, you got cold drinks, didn't you?

A. Yes.

Q. Now, where did you put Spearman out?

A. At Elba, Alabama.

Q. In town or out in the country?

A. Out on the edge of town I would say roughly, off [fol. 42] handed, about two or three miles out of town.

Q. Did Spearman ask that you not put him out?

A. No, he didn't.

Q. He was ready to get out?

A. He asked me what I was going to do with his car, and when he started to get out he had an overcoat in the back. I told the two fellows with me, the one in the back I said hand him his coat, I said it is cold outside, and his brief case. I told him I was going to leave his car up the road a short distance. He said, "Good Luck, Johnny." I said "Good Luck, I will be seeing you." and I drove on up the road a short distance and left his car and got out.

Q. He didn't ask to stay in the car at that time, even though he had voluntarily come from Florida with you, just to be with the car?

A. No, I told him I had to let him out there because I had to have a few minutes start on him. I didn't know but what he would take his car and just whiz on down and get the police.

Q. Did you tell him where the car would be?

A. Yes, sir.

Q. Did he go to it, or do you know?

A. I don't know. I wasn't there when he got to it.

Q. Did he have any money on him?

A. I suppose he did.

Q. Don't you know that you all took some of his money away from him?

A. No, I didn't exactly *take* any money from him. I asked him if he had any money, I told him we were practically broke, and I said could you let us have a little bit. He pulled out his wallet and he gave us a few dollars. [fol. 43] I don't know how much he had, he had a little money.

Q. You had brought him here. And did you let him have some of it to get home on?

A. No. It was $4.00 I think that he gave us.

Q. You asked him if he could let you have a little of it and you had the gun there.

A. I didn't have the gun there, you are assuming a lot of stuff.

Q. Where was the gun?

A. It was laying down on the back seat of the car.

Q. Where were the other two co-defendants?

A. One was up front with me and one was in the back, I think.

Q. With the gun?

A. Where the gun was at.

Q. So you asked the man if he could let you have a little money and he voluntarily gave it to you, is that correct?

A. I didn't just put my gun on him and tell him he had to give us the money. I asked him if he could let us have a little money.

Q. As a matter of fact you didn't just put the gun on him and say you take me into Alabama——

The Court: I believe that is clear.

Q. Now, did he or did he not buy the coco-colas for you and the crackers or something like that on two different occasions while you were with Mr. Spearman?

A. I don't remember him buying coco-colas at the time we gassed up. I think the next time we stopped we bought [fol. 44] some cigarettes, we stopped again and I bought him some cigarettes and I paid for the coco-colas.

Q. Was that after Spearman had given you part of his money?

A. No, no, no, that was out of my pocket.

Q. Let me ask you this: Did you ever tell Spearman that you had previously shot a man?

A. No. Not that I recall.

Q. Had you ever previously shot a man?

A. No, sir. I hadn't.

Q. Had you shot Billy Gilbert down in Florida?

A. I hadn't shot Billy Gilbert.

Q. You hadn't.

A. No, sir.

Q. And you didn't tell Allen Spearman that you shot him?

A. I don't recall telling Allen Spearman that I shot any one.

Q. Now, you went from this position where you left this car; had you seen anybody that you knew prior to the time you let Spearman out of his car?

A. Had I seen any people I knew?

Q. Yes, outside the people who were with you in the car?

A. (No answer.)

Q. Lets be a little more specific, had you seen one J. W. Wooten, or Hooten?

A. I don't know him.

Q. Did you see a man that was recommended to you by a fellow inmate as a person who would shelter you?

Mr. Moore: We object.

[fol. 45] The Court: I sustain the objection.

Mr. Varner: Did you go to a man's house, down near Elba, and near Samson, prior to the time you let Spearman, —that Spearman left, and you abandoned Spearman's car?

A. Did I go to a man's house while Spearman was present? I think that I did, I am not sure. We parked near a house.

Q. You went up to the house, did you not?

A. Yes.

Q. And you saw a man there?

A. I didn't say that I saw any man there.

Q. Well, I am asking you, did you?

A. Yes.

Q. You did. Don't you recognize his name as J. Wooten?

A. No.

Q. What was his name?

A. That was not the party I went to see.

Q. Well, who was it, the man you went to see?

Mr. Moore: We object.

The Court: Are you making an effort to lay a predicate?

Mr. Varner: His business was he was getting food. It is our contention that he got food there. And he got it from a man named J. W. Wooten and his wife, and we want to bring it up to that.

The Court: Ask him that question.

Mr. Varner: Did you on that night go to the house of J. W. Wooten and have meals served to you there?

[fol. 46] A. No, sir.

Q. Either before or after Spearman left you?

A. No, sir. Not that I remember. I don't remember going to J. W. Wooten's house.

Q. Did you go to anybody's house and get food?

A. No, not me.

Q. Did Jenks and Nunn go to anybody's house?

A. I couldn't testify as to what they did.

Q. Did they leave you and come back with food?

A. No, sir.

Q. Did you get any food there?

A. Not to my knowledge, no, sir.

Q. Now, where did you go after Spearman left you?

A. We went down in the river swamp way down on the river.

Q. How did you get there? Did you ride or walk?

A. We walked.

Q. You walked from where you were driving the car to the river swamp?

A. Right below there, yes sir.

Q. You didn't ride with anybody else?

A. No, sir.

Q. Did any dogs trail you after that?

A. No, sir.

Q. They didn't trail you after that, even though you left the abandoned car and walked off, the dogs didn't trail you?

A. That is right.

[fol. 47] Q. Then where did you go after that?

A. We went on down and stayed on the Pea River swamp until we come to Geneva.

Q. Did you have anything to eat during that period of time?

A. The only thing I recall, I don't remember eating any solid food. I may have, but I don't remember it, until that night, it might have been the night before, I am not sure of that, I believe it was Jenks, I believe it was Jenks went somewhere up there and got some milk or something like that, I remember drinking some milk.

Q. You did have some milk then the night before you were arrested?

A. Yes, I am not sure of that, milk or chocolate drink or something.

Q. Do you recall anything about having caught a rabbit at any time while in the swamp?

A. No, sir. I don't recall that.

Q. You didn't tell Mr. John Lill that?

A. Catching a rabbit, I could hardly walk man, how was I going to catch a rabbit.

Q. Well, did any of the boys with you

A. I shot a rabbit, yes, sir. I shot a rabbit.

Q. And you all tried to cook that rabbit, didn't you?

A. No; we didn't try to cook him we just left him there.

Q. When was that, do you remember when that was?

A. I don't remember it was either on the 15 or 16 or somewhere like that.

Q. You had been without food for about four days, hadn't you?

A. Yes, sir. I picked him up and looked at him, he had [fol. 48] something like these little old, it looked like he had the mange or something.

Q. You mean wolves in his back?

A. Some sores or something, I don't know what it was.

Q. Now, when you left there, you went on to Geneva as soon as you could, is that correct?

A. That is right.

Q. You went there to see whom?

A. Snooks Driver.

Q. Did Snooks give you anything to eat?

A. No. He gave us a promise to bring something the next day, instead of that he got the FBI force on us over there. That is what I thought.

Q. That is your thought on it, we move that be excluded.

The Court: Overrule that.

Mr. Varner: Where did Snooks take you?

A. Where did he take us, he took us to the hotel and put us under the hotel.

Q. I believe you testified that was late on the night of November 17 or early in the morning of the 18th.

A. That is right.

Q. And about noon of the 18th you were apprehended by the FBI?

A. Yes, in the afternoon.

Q. I believe you came up through a hole in the floor in the bath room in the hotel, is that right?

A. That is right.

Q. Who was there when you came up?

A. Well, the only thing I could see was a building full of police officers.

[fol. 49] Q. Now you were taken from there up to a room, in that hotel, is that correct?

A. Yes, sir.

Q. And up there you were allowed to wash your face and hands at the lavatory?

A. Yes, sir.

Q. And you were given a meal?

A. A meal was brought up.

Q. You didn't eat it.

A. I don't think I did anything but drink the coffee. I do recall something was brought up. They questioned me so much.

Q. They questioned you at the time the meal was brought to you?

A. Yes, sir. Prior to and afterwards.

Q. How was your throat?

A. Very sore and swollen.

Q. And your appetite was bad, you say you don't think you ate anything?

A. I don't remember eating anything.

Q. Had your throat cleared up a little then, or was it as sore as it had been any time previously?

A. It was very sore and very inflamed.

Q. Do you think it was about as bad then as it ever was?

A. Yes, sir.

Q. Now, on the date that you were tried, the date you were apprehended I believe was Friday and you were tried on Monday, is that correct? Nov. 21?

A. That is right.

[fol. 50] Q. What was the condition of your throat at that time?

A. It was still sore but it was getting a little bit better.

Q. Could you eat anything then?

A. Yes, sir, I had.

Q. When did you first start eating?

A. There in the jail in Dothan.

Q. Was that before or after the Commissioner's hearing?

A. That was after then.

Q. Was that the regular supper meal there?

A. I got there after supper I think, I did not eat anything in the afternoon, I think it was the next day before I tried to eat anything. I had a ravenous appetite there about Sunday morning.

Q. Where did you next, well first of all, when you came out from under the hotel, Nunn and Jenks did not come out with you, did they?

A. No, sir.

Q. Where did you next see them?

A. Over here in the Marshal's office.

Q. You didn't see them at the Commissioner's hearing?

A. No, sir.

Q. You didn't see them in the hall outside?

A. They weren't there, they had not been arrested at that time, I don't believe. I am not sure of that but my understanding is that they were arrested several hours after I was.

Q. Now, what did you tell Mr. Daughtry at the Commissioner's hearing.

A. I don't recall. He asked me how I would plead and he set my bail.

[fol. 51] Q. How did you tell him you were going to plead?

A. Guilty.

Q. Was that before Mr. Lill had talked with you or afterwards?

A. Which talk are you referring to.

Q. The talk in which you said your only chance to get out was to go on and plead.

A. It was in the afternoon, Sunday afternoon, when I told him I was going to change my plea that he told me that.

Q. You had already told the Commissioner that you were guilty and that you wanted to plead guilty.

A. That is right.

Q. Then no threats or promises were made you prior to the time you told the Commissioner that you wanted to plead guilty?

A. No, sir.

Q. Now, do you know Mr. Perry Calhoun?

A. Yes, I do.

Q. Where had you known him?

A. I believe he was an attorney in Dothan, Alabama.

Q. Did he represent you on a case in a previous to these instants leading to the kidnapping plea?

A. Yes, he did.

Q. He represented you on an extradition proceeding, and that was in Dothan, wasn't it?

A. Yes, sir.

Q. Now prior to the proceeding, Mr. Lill had questioned [fol. 52] you, had he not, relative to another case?

A. Yes, sir.

Q. Immediately prior thereto?

A. Yes, sir.

Q. He questioned you, did he not, in Mr. Calhoun's presence?

A. Not to my knowledge.

Q. You don't know that?

A. No, sir.

Q. Did you not at that time admit having driven a stolen automobile across the State line, knowing that it had been stolen?

Mr. Moore: We object.

The Court: When was this conversation supposed to have been?

Mr. Varner: In July of 1949, was it not?

A. Yes, sir.

The Court: I overrule the objection.

Mr. Varner: Do you want the question over?

A. I have never admitted transporting a stolen automobile to John Lill, or anyone else. I mean in relation to those cars.

Q. I am not speaking of the Spearman car, you understand that. I mean the car that you eventually, or it is alleged, that you eventually took from somewhere around Geneva to Hacoda,' Florida and burned.

A. It is Hacoda, Alabama.

Q. You brought it there from Florida, is that correct?

The Court: Are you fixing to lay a predicate, Mr. Varner?

Mr. Varner: This is in regard, your Honor, to his state- [fol. 53] ment that John Lill gave to Judge Kennamer a criminal record.

The Court: Are you seeking to lay a predicate?

Mr. Varner: I don't know, I understand I am trying to show that he admitted to John Lill that he burned

The Court: Ask him that question, then.

Mr. Varner: Did you admit to John Lill or someone there that you burned a car at Hacoda?

A. No, sir. I never did.

Q. You did not?

A. No, sir.

Q. But you knew the name very quickly and that it was in Alabama?

A. I wrote it back there in my motion to the court, certainly I know it.

Q. Where did you first hear that?

A. I was questioned extensively about it on numerous occasions, down at Dothan, Alabama, prior to the hearing, but I denied it all the time.

Q. You denied it at all times?

A. Yes, sir, at all times.

Q. Do you remember who was there?

A. I don't recall who was there. It happened several different times, he asked me about it on several different occasions.

Q. You were also questioned on numerous occasions regarding the alleged shooting of one Bill Gilbert, were you not?

A. Yes, sir.

Q. Did you deny that?

A. I denied that too.

[fol. 54] Q. Do you still deny that?

A. I still deny that.

Q. And you were also questioned in regard to a burglary of a hotel or a motel down in Florida, were you not?

A. I was convicted of robbing the Edgewater Gulf Beach Apartments and received a sentence of twenty-five years in the State of Florida for that.

Q. And you were questioned regarding that also, were you not?

A. Yes, sir.

Q. Now, in fleeing from the burglary or armed robbery, whichever it was, did any of the police pursue you?

A. I am not even admitting guilt of that crime.

Q. I am not asking you what you are admitting now, I am asking you was that true?

A. I refuse to answer that, on the ground that it might incriminate me.

Mr. Varner: Your Honor, he had been convicted of a crime in Florida, his appeal has been dismissed, and I would like to insist that he be required to answer the question.

The Court: The witness has refused to answer on the grounds that it might incriminate him.

Mr. Varner: You mean you won't let him answer that question?

The Court: You may ask him, I won't make him answer it.

Mr. Varner: We except. Does the Court understand

The Court: I understand that your question is improper. You have not predicated any date, it is not definite, it is ambiguous, and I will not require the witness to answer a question that — indefinite and ambiguous.

[fol. 55] The Court: At this time we will recess until 1:30 P.M.

Mr. Varner: I believe before we discontinued this morning for lunch, we were talking about the robbery or burglary of an apartment or motel down in Florida. I asked you did you or did you not rob the apartments on or about July 9, or 10; of 1949?

A. I did not.

Q. You did not participate in it?

A. I did not.

Q. Is that the burglary or robbery for which you were convicted?

A. Yes, I was convicted.

Q. And you appealed and your appeal has not been dismissed?

A. I believe it was.

Q. Now, I asked you to some extent about Mr. Perry Calhoun. I believe you said you knew him and he represented you on a matter concerning an extradition back in Florida. Did you see him on or about November 18 or 19, 1949?

A. I don't remember ever seeing Mr. Calhoun until this

morning since July, 1949, when I retained him to represent me in the extradition proceedings, I don't recall ever seeing him again until this morning.

Q. Are you testifying that you didn't see him?

A. I am testifying that I don't remember ever seeing him.

Q. Don't you know, as a matter of fact, that he represented you and talked to you at some length about this kidnapping case?

A. I don't remember it.

Q. You don't remember any of that?

[fol. 56] A. No, I certainly don't.

Q. Now, I want to ask you a little further about the suit that was taken from you when you were there in Jail. You said Mr. Lill and Mr. Lewis I believe took that suit from you?

A. Yes, sir, that is right.

Q. Did you not ask that that suit be sent to a cleaners?

A. On the next afternoon or the next morning when he came in, I asked Mr. Lewis about my clothes. I told him it was cold there in that cell, and I would like to have my clothes back. He said, well you can't have your clothes you don't need them in there. I said how about taking them over to the cleaners and see if you can't get them cleaned up. And he said all right, I will take them.

Q. He took them to the cleaner then for you on Saturday morning?

A. To the best of my recollection, that is true.

Q. Now, he hadn't given you any clothes to wear from Friday afternoon when they put you in there until after Saturday morning?

A. No, I had just my shorts on.

Q. How long were you left in that jail with only your shorts on?

A. Until I got ready to come to trial on Monday morning.

Q. When did your suit come back from the cleaners?

A. I don't know when they sent it back. They kept it locked up out there somewhere until I went to Court.

Q. What time then, on Monday morning did they give it to you?

A. Just before I left the jail.

Q. Is it or is it not true, that there were other prisoners [fol. 57] there also in their shorts, who had taken off their clothes because it was hot in there?

A. I don't know. I did not see but one other fellow, we were in an isolated area.

Q. Was he fully dressed?

A. No, he had his clothes there in the cell with him.

Q. You testify then that your clothes were not on your bed, but they were out of your cell during all of that time?

A. That is correct.

Q. Now, whose suit did you wear to court here in Montgomery?

A. My own.

Q. You did wear your own? Well you testified, I believe, that you had to borrow a suit from the other, I believe it was Earl to wear out somewhere, where did you go then?

A. I borrowed a pair of trousers from him when they came to take me out for interrogation there, they carried me out to the interrogation room and I borrowed some trousers from Earl then.

Q. From the time you were put there on Friday afternoon, during what hours were they interrogating you?

A. My recollection is not so strong there, I believe it was about five or six until somewhere around nearly midnight.

Q. Did they let you alone after that?

A. Yes, sir.

Q. At what time did they start again the next morning?

A. I believe it was Mr. Lewis who came around there the next morning, shortly before noon and talked with me awhile and Mr. Lill came back there that afternoon and [fol. 58] questioned me until about supper time and they started feeding and they left. They came back after supper and stayed until late at night.

Q. Do you have any complaints about not getting enough sleep, either Friday, Saturday or Sunday night?

Mr. Moore: We object to that question.

The Court: I sustain the objection.

Mr. Varner: Well, were you given eight hours sleep?

A. I would not say that I slept that much. I had a little sleep. It was cold in there.

Q. How long did they question you on Sunday? If at all?

A. Approximately all day up until late that night.

Q. Now, during those interrogations, did they ask you about your former record?

A. I don't recall, whether they did or not.

Q. Well, you do have a former criminal record prior to the burglary case in Florida, do you not?

A. Yes, sir.

Q. You don't deny that you were sentenced in Texas for 18 months on the Dyer Act charge?

Mr. Moore: We object

The Court: Overrule the objection.

Q. That was in 1941?

A. No, I deny that.

Q. And you don't deny that in Bay County, Florida, in [fol. 59] 1943, you were convicted and sentenced to six years, on the charge of the Dyer Act?

A. That was not in Bay County, that was in Leon County. I was arrested in Bay County and convicted in Leon County.

Q. And you don't deny another offense in 1944. Is that the same offense?

A. That is the same charge, it is a series of offenses there, it is all the same thing.

Q. The one in Texas and the one in Florida were not the same ones, were they?

A. No, sir.

Q. You stated awhile ago that John Lill offered you a deal if you would give him certain information. What was the nature of that information?

A. You mean pertaining to this fellow he showed me the picture of?

Q. I don't really know. I am basing it on your testimony.

A. He offered me so many things I was trying to separate the individuals.

Q. Well you stated that on Sunday afternoon, as I recall it, that you told Mr. Lill that you were not going to plead guilty, and he told you that he would, as you worded it, that he offered a deal to you if you would help him out on some other matter.

A. He had a picture of some fellow, I don't know who he was, he came back and showed me these pictures, and

said he had good reason to believe that particular person was in the locality, and he wanted to know if I knew him, which I didn't, and he told me we could do business if I could help him apprehend that particular criminal. I don't know who he was.

Q. Did he ever specify what he meant by you could do business?

A. No. He did not. As far as the other deal, he was to intercede for me and I would not receive a sentence to [fol. 60] run over ten years and that would run concurrently. I could come on up here and get it over with.

Q. Mr. Lill was apparently being friendly to you, at that time?

A. Oh, yes, sir.

Q. Pretending to help you out.

A. Yes, sir.

Q. When was it that he told you that he didn't care if you lay down and died?

A. That was shortly after my entering jail. He was pretty aggravated. On Sunday he decided he would be my friend and help me out.

Q. Did you ask him for the doctor when you were being helped out.

A. I don't recall whether I did or not.

Q. You were still sick on Sunday, I believe you testified to that?

A. Yes, sir. I was.

Q. And you were still bleeding, were you not? From your leg?

A. I had an open injury here on my leg that didn't start healing up and it was bleeding for several days after my trial, when I was sentenced.

Q. During this time, how many people did you ask for a doctor. Who, besides Lill?

A. I asked Mr. Lill because he was directly in charge of me, I asked Mr. Dorman, or whatever his name is, in the jail. I recall asking him, I think that I asked Mr. Lewis, I am not sure about that. Off hand, that is about all I can remember.

Q. Now, you were brought on to Montgomery, and you testified that you were taken in and talked to Mr. Davis, I believe. Did Mr. Davis threaten you in any way?

[fol. 61] A. That would depend on what would be interpreted as a threat.

Q. Well, as you interpret it.

A. He seemed to want to know about this party that was supposed to have harbored us, he insinuated if I didn't tell him that J. W. Wooten, that they had down there was the party, that Judge Kennamer would hear about it, and he wouldn't like it very much. That was the interpretation that I placed on it.

Q. Exactly what did he say. I want to know exactly what he told you as nearly as possible.

A. He wanted to know, he asked me if this fellow Wooten, if we could identify him, or if we could testify or give him a statement to the effect that Wooten was the one that had harbored us. When I said I don't know Wooten, he said Judge Kennamer is not going to like that. He left me with the impression that if I didn't say that Wooten had harbored me he was going in and tell the Judge all about it. That was the impression I was left with.

Q. You weren't left with the impression that the Judge might ask you in the hearing who harbored you, or that that if you didn't tell him on the hearing that he might not like it?

A. No, I was not of that impression.

Q. You thought that Mr. Davis, wanted you to tell Mr. Davis, whether or not Wooten harbored you, is that it?

A. Mr. Davis left me with the impression that he wanted to use my plea as a club over my head, that he was going to make it hard if I didn't tell.

Q. And you went on in the court room and plead guilty, did you not, in spite of Mr. Davis?

A. Yes, sir.

[fol. 62] Q. You didn't hear Mr. Davis say anything to the Judge regarding that?

A. No, sir.

Q. And you were with him all the time here in the court room?

A. No, I was not. I don't know what transpired after I left his office.

Q. Where did you go when you left his office?

A. I am not sure whether I came directly into court or whether I went back to the Marshal's office. I think I came directly into court.

Q. Well, didn't Mr. Davis also come directly into court?

A. I don't remember.

Q. Do you remember who else was in Mr. Davis' office when you were there?

A. There were several people there.

Q. Do you recall that Jenks and Nunn were in there?

A. Yes, sir.

Q. Do you recall that Mr. Lill was there?

A. Yes, sir.

Q. Do you recall that Mr. Jack Johnson was there, the deputy marshal.

A. No, I don't.

Q. Do you recall that Mr. Arthur Mason, the Highway Patrol was in there?

A. No, I don't know him.

Q. Do you recall that Mr. Lewis was in there?

A. I think that he was.

Q. Do you recall that Mr. Davis asked a statement be signed there in your presence to the effect that Mr. Davis talked to you and Nunn and Jenks, in the presence of these [fol. 63] witnesses and that he offered you no threats or promises?

A. I don't recall that.

Q. Now, as you were coming toward Alabama in Spearman's car, who was driving the car?

A. Well, I believe we changed around on it. Dick Nunn.

Mr. Moore: We object to the question as being vague and indefinite.

The Court: Overrule the objection.

Mr. Varner: Who was driving?

A. I believe Nunn started driving and after awhile we stopped a few miles out and I took the wheel.

Q. Did you drive on up to Elba?

A. Yes, I drove from then on.

Q. How many stops did you make, do you remember?

A. I do not remember.

A. You testified this morning that you had seen this Allen Spearman before. Do you know where you had seen him?

A. I had seen him before his face was familiar to me. As far as any certain place I had seen him I don't recall that. I think it was around Dothan.

Q. Did you at any time place a blindfold on him? On Spearman?

A. Yes, sir. I did.

Q. How long was he blindfolded?

A. A few minutes, I stopped and told him I was having to blindfold him for a few minutes; that I wanted to see a fellow and I didn't want him to see what direction I was heading in. I just didn't want him to know where I was going. That was all.

[fol. 64] Q. Who was that fellow you were going to see?

A. I went over to see a fellow, but he wasn't there.

Q. Did you ride up to his yard?

A. I rode up to his yard or to his place, it was a night club, and he was not there.

Q. Did you subsequently find that fellow?

A. No, I didn't.

Q. You stated a while ago that Lill offered you a lot of things. I wonder if you wouldn't list those for me.

A. Well, he offered to intercede for me, and talk to the Judge, and to the various members or whatever his various connections was, he assured me I would not receive over ten years, and he would try to get those ten years to run concurrently with the twenty-five years I was then serving in the State of Florida; that was the main promise. The main thing was that he advised me to plead guilty more than anything else.

Q. That he would talk to his connections, he assured you, he didn't just say he would try to get you ten years, or he didn't say you probably won't get more than ten years?

A. No, sir.

Q. He said, you won't get more than ten years, is that right?

A. He said you will get a very nominal sentence, not to exceed ten years. He said, I will asure you that you will not get over ten years. If you go ahead and fight the case you can get the death penalty, if you plead guilty you can't get more than life.

Q. Now, you stated you had fever at the time you were [fol. 65] apprehended on the 18th, did you still have that fever Monday, when you were taken into court?

A. I had fever and chills, too, the night before my apprehension.

Q. How about subsequent to that time, up to the time you plead guilty? Did you have any chills after the day you were apprehended?

A. I don't recall having any.

Q. Did you have any fever after you were apprehended?

A. Yes, sir. I had fever on Saturday night and Sunday morning, I had a very high temperature.

Q. But you didn't have any chills in spite of the fact that they had left you there with only your shorts on?

A. I don't recall having chills, I don't remember.

Q. Now, to whom did you make a request, if anybody, for a lawyer?

A. I asked Mr. Lill if I could use the phone to call an attorney.

Q. Did you tell him that you wanted to call an attorney?

A. Yes, sir. He said I could not use the phone.

Q. Did you ask him to call an attorney for you?

A. No, sir. I asked him if I could use the phone to call an attorney.

Q. What attorney did you propose to call?

A. Mr. Amos Lewis.

Q. In Dothan?

A. No, in Mariana, Florida.

Q. Did you offer to pay the charges for calling him?

A. Yes, I did.

Q. Was your nose still bleeding at the time you were in jail there?

A. I don't remember, I think it was. I am not sure. [fol. 66] My nose was just bleeding periodically. It may not bleed and then start at any time.

Q. Did Judge Kennamer ask you if you wanted an attorney?

A. Yes, he asked me if I wanted an attorney.

Q. Did he tell you that you wouldn't have to pay an attorney if you did not have the money to pay an attorney?

A. I remember reading that in the transcript.

Q. He didn't tell you that you couldn't have a lawyer?

A. I know it from reading the transcript. As far as I remember. I don't remember what he did say.

Q. Do you recall that in Mr. Davis' office he told you that you could have an attorney?

A. Yes, sir. He did.

Q. And that was whether you could pay him or not?

A. Yes, sir. He told me the Court would pay for an attorney if I wanted one.

Q. And you told him you didn't want an attorney, did you not?

A. Yes, I believe I did.

Q. He told you that you were entitled to have your case go before the grand jury if you insisted on it, did he not?

A. I don't recall Mr. Davis telling me that.

Q. Did he tell you you could be tried in Dothan if you desired?

A. I don't remember that conversation.

Q. Do you recall any conversation between you and the Judge regarding the fact that your mother was sick?

A. I remember reading it in the transcript. I don't recall [fol. 67] the actual conversation.

Q. Do you recall any conversation between yourself and the Judge, regarding the fact that you did not harm Spearman in any way?

A. I remember saying something to him at the time of the sentence. I wanted to bring that out because of the fact that we hadn't harmed the fellow, because Mr. Lill had mentioned to me that because there was no animosity shown the Judge would be very lenient with us. I wanted him to do that, and you can understand that.

Mr. Varner: That is all, your Honor.

Mr. Moore: We have no further questions at this time.

The Court: Mr. Smith, let me ask you a question or two. Did you at the time of escape warn these other men who escaped from the jail in Florida, and they left and returned with a shotgun, do you know where they obtained the shotgun?

A. As far as knowing, your Honor, I don't know.

Q. Did you have a reason to believe that the shotgun was stolen by them?

A. Yes, sir. I knew it had to be stolen.

Q. Was that shotgun transported in the automobile from Florida to the State of Alabama in this car?

A. I am not sure that it was. I think it was.

Q. What shotgun was it that you were testifying about early in the testimony that was laying on the back seat of the car when Spearman was blindfolded?

A. That was before we came into Alabama, I don't know, I guess it was. I am pretty sure that it was with us.

[fol. 68] Q. That is your best judgment?

A. Yes, sir.

Q. Let me ask you this, when you came into Court on or about the 21st of November 1949, and this proceeding transpired whereby you entered a plea of guilty in this kidnapping offense before Judge Kennamer, were you on that occasion suffering any fever?

A. Yes, sir. I was while in the court room, yes, sir. I was very sick the morning I came up here.

Q. Did you, after you were placed in the custody of the Marshal here in Montgomery, prior to the time you came in the court room, make any request for medical attention to the Marshal or anyone else?

A. I don't remember, I don't think that I did.

Q. Where were you taken after you entered your plea of guilty? After Judge Kennamer sentenced you?

A. I was taken to the City Jail and kept overnight.

Q. After you left the court room, after you were sentenced and taken to the City Jail, did you request any medical attention there?

A. No, sir, I did not. I got some BC powders, I asked one of the boys over there at the jail, one of the colored boys, to get me some BC powders.

Q. Do you recall how long it was after the Judge sentenced you before you were transferred to the penitentiary in Atlanta, Georgia?

A. The next day.

Q. After you arrived in Atlanta, did you request any medical attention?

A. Yes, sir. I got very prompt treatment after I got back there, I was given some medicine.

[fol. 69] Q. You did receive treatment in Atlanta, Georgia?

A. Yes, sir.

Q. All right. That is all. You may proceed, Mr. Varner.

Mr. Varner:

Q. We have the rest of the Medical Records that came in today. They were mailed last Thursday. If it please the Court we can look at them. Mr. Moore and I can look at them this afternoon and see whether or not we want to put them in.

Q. Look at this signature right here, is that yours?

A. It looks like it.

Q. Was that the day that you entered Atlanta?

A. No, sir.

Q. Were you in Atlanta on December 1st, 1949?

A. Yes, sir. I entered there on November 21, 1949.

Q. What was your condition on December 1st, 1949?

A. Some better.

Q. How was your leg at that time?

A. It was healing over.

Q. It was completely well?

A. No. I didn't say that, I said it was healing over. It was coming along fine.

Q. What was your condition at the time you went into Atlanta?

A. I was limping very severely and this mental state that I was in before, and the same condition that I was in when I received that sentence the day before.

[fol. 70] Now, on December 1st, you stated to someone who was making out this record, that you had no physical or mental complaints, that was correct as of that day?

A. December 1st? I would like to see that record of the day I entered there.

Q. Were you interviewed by a man named Mr. Christmas on the day you entered?

A. No, sir.

Q. You were not.

A. Dr. Hess was the fellow I talked with, he gave me an examination.

Q. Did Dr. Hess treat you?

A. He gave me some medicine and suggested I go to bed.

Q. What did he do for your leg?

A. He bandaged it.

Q. In this statement purportedly signed by Mr. Christian, on which is shown a statement in regard to injuries: "None." was not made by your suggestion?

A. No, sir. I don't recall even seeing Mr. Christmas. I don't even know a man by that name.

Q. He is not a doctor he is a technician.

The Court: Is that in evidence.

Mr. Varner: Yes, sir. That is all.

The Court: Any re-direct?

RE-DIRECT

Mr. Moore: One question. What was the nature of the treatment that Dr. Hess gave you in the first few days after you came into Atlanta?

[fol. 71] A. He gave me some medicine, I don't know what you call it.

Q. How was it to be used?

A. He taped my leg up and he gave me something called diatherapy, and then I was to take these whirl-baths, the water whirling around in a whirl pool bath, physiotherapy or something like that. And he gave me various medicine to take, sleeping pills, etc.

Mr. Moore: I think that is all.

ROBERT PETER JENKS, called as a witness, being duly sworn, testified as follows:

Direct examination.

Mr. Moore:

Q. State your name, please, sir.

A. Robert Peter Jenks.

Q. How old are you, Mr. Jenks?

A. Twenty-three.

Q. Are you currently serving time in a federal penal institution?

A. Yes, sir.

Q. Where are you serving at the present time?

A. Lewisburg, Pennsylvania.

Q. Did you enter a plea of guilty along with Johnnie Ray Smith and Richard Dale Nunn in this court room before Judge Kennamer on December 21, 1949?

A. I did.

Q. Do you recognize this man sitting over here next to me with glasses on?

[fol. 72] A. Yes, sir.

Q. When was the last time you had seen him?

A. The day of the trial.

Q. Have you had any correspondence with him since that time?

A. I had a letter from his lawyer one time.

Q. What was the nature of that letter from his lawyer?

A. He asked me to make out an application to the effect of what condition Johnnie Ray Smith was in at the trial and before the trial. I did not receive the letter until three or four months after it was posted.

Q. Is that the only correspondence that has been between you and Mr. Smith?

A. Yes.

Q. Were you incarcerated in jail in Panama City, Florida, on November 12, 1949?

A. Yes, sir.

Q. Did you break jail with Johnny Ray Smith?

A. Yes, sir.

Q. Tell us what happened at that time. Start at the time when you cut a hole, and who went out first, etc.

A. We took a couple of hand saw blades and we cut a hole in the wall, and then we went out and cut a bar in the window, we waited——

Q. How big a space did that leave in the window when you cut this bar out?

A. It was very small because somebody had broken out of the jail before and we cut above and below where it had been welded in before, and it left a space sitting out like that, just barely enough room to get through. We [fol. 73] had to take our shirts off to get through.

Q. Who went first?

A. Nunn went first.

Q. Who was the last man through?

A. Johnnie Ray Smith. I was second.

Q. How did you get down?

A. I climbed down the wall.

Q. How far was it where you climbed down to the ground?

A. Three stories. The building was built on the side of a hill and the whole basement was exposed and that made it three stories actually.

Q. Did anything unusual happen at that time?

A. Yes, sir.

Q. What was that?

A. Me and Dick Nunn got out first. We hid around the corner there, I guess there was some noise. Anyway Johnnie Ray pulled the rope back up and waited a few minutes until it quieted down, and he come on and threw the rope out again. The rope was about twice as long as it had to be to reach the ground, it looked like it went into a loop, when he come out I guess he grabbed the wrong end because he fell.

Q. What happened then?

A. He hit on one of these windows on the lower floor.

Q. You mean a window ledge, or was there something protruding there or something?

A. Yes, sir. The windows open like that.

Q. Were the windows open?

[fol. 74] A. Yes, sir. He hit on one and bounced off and hit the ground. He was pretty well knocked out. He was pretty well beat. We ran up and grabbed him and took leave over the fence. We went across the bridge and up through the residential district where we picked up a car.

Q. Where did you go when you got that car?

A. We went out on the highway, I don't know that district very well, we went on out.

Q. You went out in the country somewhere?

A. It was in the general direction of Blountstown, I believe.

Q. How long did you ride?

A. About twenty minutes.

Q. Did anything unusual happen then?

A. A police car was coming towards us, right down the highway, and we were driving on the highway, he went past us and started turning around. We had already run this car as fast as we could, it would not go fast. So when he started chasing us we pulled to the side of the road and

jumped out of the car and ran off in the field. Johnny Ray got out on the other side, he was dragging along back there, he was behind us, and we had to wait for him. At that time the police car came up with us, they jumped out and started shooting at us. They had their headlights on and they turned it on us, they started shooting at us but they didn't hit us, they had a shotgun and a pistol. And when Johnny Ray come up to us he was limping. We got hold of him one on each side and helped him along. We got away back where it was dark, where no lights could hit us and then we walked.

Q. What was the nature of the terrain there?

[fol. 75] A. It was rough. It had high grass and we kept tripping and falling. I lost my hat and everything.

Q. Was there any water?

A. It was wet I know that. I don't know whether it was water or dew or what.

Q. That is what I mean, on the grass, did you get wet?

A. Yes.

Q. What was the temperature? Cold or hot, I don't mean the degrees.

A. It was pretty cool.

Q. How were you boys dressed?

A. I had a wind breaker jacket, shirt, pants. Dick had on an army jacket. He didn't have on a shirt. Johnny Ray had on a suit.

Q. All right, after this hundred yards where did you go then?

A. We kept going. We could hear them back there raising heck, and hollering and searching around for us. We kept going and kept going for two or three hours. Then we heard the dogs barking and we guessed they had the blood hounds after us. We were on a sort of plain there and there was a swamp there, it was real swampy and we went into the swamp to try to throw off the dogs.

Q. Was there any water there?

A. Yes. We only had a little flash light, I was never so scared in all my life. We didn't know whether the big logs were alligators or what.

Q. How long did you keep going like that?

A. It must have been a couple of hours. We went through the brush in the swamp and we heard music at a distance. [fol. 76] We didn't know where it was, but we went toward

it. The sky was overcast, you could not see any stars. We had nothing to guide us.

Q. How long did you stay in that swamp?

A. We never did actually get out of the swamp.

Q. Well how long did you stay out there before you came upon houses?

A. About two or three hours.

Q. What happened then?

A. We come behind this place, it was a colored night club. They were having a shindig. We lay out there and watched them for a while. We were pretty well beat by then we rested a time and then moved on.

Q. Did you go back to the swamp then?

A. We were still in the swamp. There was water there, we were laying up by a hammock there. We went on for a while until almost daylight. We were all pretty cold and sleepy by then and we found this little place where there was pine and stuff there on the side of the hill and we gathered up some stuff and made a fire to get warm by. We laid down and slept for awhile. The sun came up and we had got warmer and had got a little sleep. I guess we lost the dogs during the night. We kept on traveling after we woke up. We travelled all that day and quite a bit in the night there. Then we laid down to try to get some more rest and it was pretty cold and wet.

Q. Did you have a blanket?

A. No, sir. It was late in the night when we got up and started moving on. We kept moving until almost daylight, we laid down and got some more rest and the sun came up again. We moved on some more. We heard a noise at a distance. We didn't know where we were then. We went [fol. 77] toward it and used it for a guide. We went on and could see a highway, a cement highway.

Q. How long had you been in the swamp then?

A. Three days.

Q. Had you had anything to eat?

A. No, sir.

Q. Did anything else happen to make you think you were being sought?

A. There were planes flying over all the time. We hid every time they would come over. We hid in the trees and bushes when they happened to be handy.

Q. What was Johnny Ray's condition at that time?

A. He was mighty sore like the rest of us, he was probably more so, after his fall. He showed me a bruise. He had a big black and blue mark he had where he hit the window.

Q. You say you heard some noise out on the highway?

A. Yes, sir. We could see it was a highway and decided we would follow it, off at a distance and use it as a marker to go by. We travelled quite a bit that day and we got tired, we were really tired by that time, we could hardly go half a mile and all of three of us would lay down and rest.

Q. Did it rain any during that time?

A. It didn't rain then but it did that night. We come up in this field and were cutting across the field, we could see this glow off at a distance, the lights of a town, we sat around in the field and talked for awhile about what we were going to do. We decided to lay down and get a little rest before we went into town. We didn't want to get in [fol. 78] too early. We laid down there. It was real cold. I couldn't sleep. I laid there about an hour and a half to two hours, and I couldn't sleep. I woke them up and we went on, we got to the highway and we had to cross the highway, just as we crossed the highway it looked like the sky fell on us, the rain came down in buckets full. We took in at a wooded area there and made a fire, we were soaking wet and cold. We laid there the rest of the night and tried to keep warm by that fire. The next morning we decided we would move on in and get closer to this town. We went on down and got pretty close. We could see it at a distance. There was a house there partially built, we got in there to rest up awhile, so we could go in town at night. We did not want to be seen. We lay there two or three hours. There was a farm house down the road. We were sitting there and watching it to see if anybody came out. Nobody moved, so we were hungry and we decided to go down and see if we couldn't get something to eat, just me and Dick, we left Johnny Ray in the house because he was stove up. We went down to the house and rapped on the door and nobody answered. We opened a window and went on in. We got some food and ate some right there and put some in a bag. We got some clothes and other stuff and went on back and picked up Johnny Ray and went on toward town.

Q. What was your physical condition at that time. Did you have trouble eating?

A. It was the worst physical condition I was ever in. I had been laying in jail three or four months and I was not getting any exercise, I was weak and pretty well sold.

Q. What sort of food did you get out of that house?

[fol. 79] A. Just canned food and cold biscuits and stuff like that.

Q. Did you get a shotgun out of there at that time?

A. Yes, sir.

Q. Did you ever see Johnny Ray eat any food?

A. He didn't eat it, but we had some there he could eat. As we were coming in towards there after that big rain, we were coming down the highway angling on a wagon road, we were walking along it, so we could see the highway. This turtle came out and we grabbed him up and took him and cooked him. That was the only food we had had.

Q. Then after this had happened where did you spend the rest of the night up until—I will ask you first, were you finally picked up at the hotel in Geneva, Alabama?

A. Yes, sir.

Q. Where did you spend the rest of the night after that time? I mean were you in doors or out doors, before you were picked up?

A. We were in the swamp.

Q. What was the climatic conditions?

A. It was cold and drizzly.

Q. How did you get from this last station in the swamp into the hotel?

A. We walked part of the way, and found this old broken down delivery car and went part of the way and we had to leave it and walked on.

Q. Then, on what night did you go under the hotel, do you know?

A. I don't know, I lost track of the time.

Q. You say you had lost track of time, why were you tired?

A. I was about half-asleep after the second day, for [fol. 80] the rest of the time on. We didn't get any actual rest, we would lay down and catnap.

Q. Who put you under the hotel?

A. Nobody put us under there.

Q. Who showed you the way?

A. This other guy, we made contact with him at that time, he told us to go to the hotel.

Q. Did you have any covering, clothing, extra clothing under the hotel?

A. No, nothing except what we had on.

Q. Did he bring you any food?

A. No.

Q. Did you get any rest under there?

A. Just catnapping, it was too cold to do any sleeping. I know I woke up several times during the night.

Q. When were you arrested, 'was it the following day?

A. It was the following day, I guess it was about 3:00 o'clock in the afternoon.

Q. After you came out from under the hotel, where were you carried?

A. Up stairs in the hotel.

Q. Were you interrogated there?

A. They just shook us down, that was all.

Q. You mean they searched you?

A. Yes, sir. And they sent out and got some chow and we ate. And then they took us in separate cars to Dothan.

Q. When you were in separate cars where did you go?

A. To Dothan, Alabama.

[fol. 81] While you were in jail in Dothan did you ever see Johnny Ray Smith at all?

A. No.

Q. Who interrogated you while you were in the jail?

A. The F.B.I.

Q. Do you know any of the agents by name?

A. Mr. Lill.

Q. John W. Lill, Jr.?

A. Yes, sir.

Q. Was he there at the time you were interrogated?

A. Yes, sir. He is the one that took my statement.

Q. Did you give him a statement in Dothan?

A. I guess so.

Q. Did you have any conversation with him before you made the statement?

A. He questioned us, he interrogated us.

Q. During that questioning and interrogation did he talk with you about the crime you had committed?

A. Yes, that is all he did talk about.

Q. Did he tell you about what you could get?

A. Yes.

Q. What was the nature of that conversation?

A. He said we had committed a very serious offense, kidnapping and we could get anything for it, from life to the death penalty, if they wanted to give it to us. This was to get my statement, he wanted me to tell him what happened. He said if we would cooperate and give him [fol. 82] a good statement all we would get, if we would tell them we were not 21, and Dick and I were 17 years old, and because we were so young. If we wouldn't cooperate he was liable to turn us over to the State authorities and they didn't have a law like that, so we gave him the statements, or I did.

Q. Was that the reason you gave him the statements?

A. Yes.

Q. Who wrote the statement?

A. He did.

Q. Did you ever see Johnny Ray Smith in Dothan after that?

A. No sir.

Q. When was the next time you saw him?

A. In court here, in this court house.

Q. When were you brought up here? To court?

A. On December 21st.

Q. Was that on Monday following your arrest on Friday?

A. I don't remember the date.

Q. Where were you taken when you were brought to the federal court house?

A. We were taken to some office.

Q. Do you know whose office it was?

A. I don't remember. I don't actually know what his name was.

Q. Do you remember the people at the prison?

A. The photographer was there.

Q. Do you know any court officials?

A. No, just the Marshal.

[fol. 83] Q. Was Mr. Lill there?

A. I don't know if he happened to be on the spot or not. He was with us that morning. He was with us all the time I am pretty sure.

Q. What happened when you got in this room that you don't know where you were and don't know who all was there?

A. They asked a lot of questions, minor questions.

Q. Is that all you remember that happened before you came into court, after you came to this court house?

A. I don't remember I didn't figure it was very important at that time. They just talked and asked how old we were and such. We smoked a couple of cigarettes and then they brought us into the court room.

Q. Were you given any papers to sign before you came into court?

A. We signed some afterwards, not before.

Q. Is that all you remember about what happened before you came in the court room?

A. Yes, sir.

Q. Nobody ever explained to you what you were signing, if you signed anything?

A. I didn't sign any papers.

Mr. Varner: We object to that.

The Court: Overruled.

Mr. Varner: We except.

Mr. Moore: How far did you get in school, Mr. Jenks?

A. At the time we only had the 8th grade, I have a high school diploma now.

[fol. 84] Q. How old were you?

A. 17.

Q. And all the formal education you had was 8th grade?

A. Yes, sir.

Q. When you were brought into this court room, was it this room you are in right now, or do you remember?

A. It looks the same.

Q. Judge Kennamer was on the bench, wasn't he?

A. Yes, sir. It was Judge Kennamer.

Q. What took place when you were there?

A. We come into the court room and he got us in front of the bench here and he asked us if we had counsel, I guess. We said, "No." He asked us if we wanted counsel. We said "No." And he asked us how so you plead? I.

don't remember the exact sequence. We said we pleaded guilty. He said something, anyway I remember I was scared and pretty shook up. It was the first time I had ever been in a big court room. And they took us out to somebody's office again, and he told us something about our rates.

Q. Was that before you went before the Judge?

A. Yes, he brought us up first and the Judge asked these questions and court was recessed or something. He sent us to the prosecuting attorney's office.

Q. Who was that?

A. I don't know.

Q. What did he look like?

A. I don't think he was too big. He was a sort of short guy. This is the way I remember it, he had on a blue suit, [fol. 85] I am pretty sure, and I think he had dark hair.

Q. Where did he take you?

A. He took us to his office.

Q. Was that in this building?

A. Yes, sir.

Q. What did he tell you when he got there?

A. He told us, or rather, he asked us if we knew what we were doing.

Q. Did you?

A. I told him we pleaded guilty to this thing because I felt that was the best thing to do.

Q. While he was talking did he tell you any of these things?

Mr. Varner: We are going to have to object to his leading the witness.

The Court: Is this predicated upon being at the time Smith was present?

A. Yes, sir.

The Court: Overrule the objection.

Mr. Varner: We except.

Mr. Moore: Was Johnny Ray present when he talked to you?

A. Yes, sir.

Q. All three of you were there?

A. Yes.

Q. Were you told what the charge was against you?

A. Yes, sir.

Q. Did he read it to you?

A. Yes, he said it was a kidnapping charge.

[fol. 86] Q. In other words, he read you some paper, do you remember the wording of the paper?

A. Well, he read something about interstate commerce.

Q. Did he tell you any possible defenses you might have?

A. He asked us why didn't we have lawyer, and we told him we didn't think we needed one. He said, well you know boys, this carries a life and death penalty, and he said we may carry you back into court.

Q. Well, when you went back into the court room then what happened?

A. Well, we got up in front of the Judge again, and he said how do you plead again and we said guilty, I guess he said some more, I don't exactly remember what he said.

Q. Did the Judge ever tell you the allowable range of punishments?

A. I don't remember whether he said anything about that or not.

Q. Did he tell you anything about the possible defenses you might have to the charges?

A. No, sir.

Q. Did he discuss the case with you?

A. The Judge, no.

Q. When did you tell the FBI that you wanted to go to the District Attorney and plead guilty?

A. He took our statements, he said if you plead guilty you won't get anything because you are not 21. So we thought we would plead guilty.

Q. You thought you had plead guilty at that time, is that correct?

A. Yes, sir. From there on I guess he took it for granted that we would plead guilty.

[fol. 87] Q. After you made your plea, then where were you taken, after Judge Kennamer gave you fifteen years?

A. We were taken up to the Marshall's office.

Q. Who did you see back there?

A. The officers who took us back, the FBI men.

Q. Was Mr. Lill one of them?

A. Yes.

Q. Did he have any conversation with any of you?

A. I was pretty shook up at the time, I heard him talking to Johnny Ray.

Q. Do you remember that conversation?

A. I don't remember all of it.

Q. What do you remember?

A. He told him something about he couldn't go around shooting people, they would get him for it, or something like that.

Q. Did he ever tell you anything else about Johnny Ray?

A. Yes.

Q. When?

A. When he was interrogating us.

Q. Where?

A. At the same place he took our statements.

Q. What did he tell you at that time?

The Court: What Mr. Lill told this man out of the presence of Smith is not admissible.

Mr. Moore: I think that is all.

Cross

Mr. Varner: Let's go back to the time of the jail break, in the first place was Johnny Ray Smith in the cell with you [fol. 88] at the time of the jail break, when it started.

A. Yes, sir.

Q. Who else?

A. There was Dick Nunn, Johnny Ray and myself, Buck Smith, and a red-headed guy, I don't know his name.

Q. Did all five of your break?

A. No, sir, only the three of us.

Q. I would like for you to describe in detail as much as possible how high Johnny Ray Smith was, when he fell? You saw him fall?

A. Yes.

Q. Was he in the window when he commenced to fall, or was he outside?

A. I guess he was outside, he was hanging on it.

Q. He was hanging on the rope?

A. No, he was hanging on the window, he let go of the bar and grabbed the rope——

Q. Is that when he fell?

A. Yes, I guess so.

Q. Now, his feet were up against the wall, were they not? He was facing the wall, was he not, or was he?

A. Yes.

Q. When he fell his hands broke loose, is that correct?

A. No.

Q. Well what part of him fell first?

A. His feet, I guess, he let go and grabbed the rope, [fol. 89] he grabbed the rope; and he grabbed the wrong end of the rope.

Q. Well, he grabbed the rope with his hands, did he not?

A. Yes.

Q. And he was at that time facing the bars, is that correct?

A. He was half facing the bars and half facing out.

Q. You can't face in two directions at one time.

A. He was sideways.

Q. He was holding on to the bars and as he grabbed the rope, he fell. Did he seem to hang there for a second as he fell or did he just fall right out?

A. Well, he seemed to hesitate there, I guess the rope was partially caught or something. It all happened so fast.

Q. Now, what did he hit on the way down?

A. You see on the bottom floor is a pair of windows, that open out like that. He hit on the edge of one of those windows.

Q. He hit the edge of one of those windows. He was out away from the building, he didn't hit the building; but he hit the window sticking out from the building.

A. That is right. I was out from the wall, I couldn't see anything, whether he hit the window or building or what. All I know is he hit the window.

Q. Could you tell me what position he was in when he landed? Did he land on his back, side or where?

A. He was all sprawled out.

Q. Could you tell me what position he was in when he hit the window?

A. I guess he hit on his hips.

Q. You guess he hit on his hips?

[fol. 90] A. That is the way he hit, I mean coming down.

Q. Now, as you left, you went on off you say and you

stole an automobile and you drove that automobile until you passed the highway patrol, and they turned around and you thought that they would probably outrun you, so you abandoned the car? And went into the swamp?

A. Yes, sir.

Q. Now, you stated I believe that the highway patrol shot several times as you were leaving. Were you in sight of them then. Could you see them?

A. I could see them.

Q. Where was Johnny Ray Smith? At that time?

A. When we first got out of the car we all three run, Johnny Ray was behind us, he could not run as fast as we could.

Q. Who was driving the car?

A. It was either Dick or Johnny Ray. I was in the back.

Q. What side of the road did you pull the car off on?

A. I believe it was on the right side of the road.

Q. And you got out the right side?

A. Yes.

Q. And Dick was ahead with you?

A. I was ahead of them all.

Q. Well, was Dick right with you?

A. Yes.

Q. Was he pretty close to you?

A. Yes.

Q. And Johnny Ray was the third man? Do you re- [fol. 91] member that Johnny Ray was on the left driving that car?

A. Yes.

Q. You and Dick had got out the right hand side?

A. Yes.

Q. Johnny Ray was behind you then when the police started shooting?

A. Yes.

Q. Did you see him at that time?

A. We stopped at that time.

Q. Could you see Johnny Ray?

A. We could see everything, because they were in front of the headlights, we were looking against the lights, see.

Q. Did Johnny Ray limp at that time?

A. Yes.

Q. Was he running?

A. He was running but he was pretty shaky running.

Q. Did he run right on until he caught up with you or did he stop?

A. He slipped down about twenty-five or thirty feet from us, we said, "Come on".

Q. He never fell?

A. He might have fell before I turned around to look. I was running away from him.

Q. Now, how long did you stay in the swamp there, at that time?

A. All night.

Q. And you came out early the next morning, was that correct, or did you stay on?

[fol. 92] A. Actually we were in the swamp, I mean we were in again and off again, if you mean actually in the watery type of swamp, we were just off and on in it, and off and on out of it.

Q. But you didn't hear the dogs again there that night?

A. There was nothing positive, nothing that we could be positive of in regard to the dogs, whether they were after us or not. The first night we were pretty sure they were out after us.

Q. How long did you stay in the swamp there now, before you got transportation into Alabama?

A. Three and a half days, or something like that.

Q. Isn't it true that you came into Alabama on the 14th of November.

A. I can't tell you if that is the exact date.

Q. You do recall that you broke jail on the 12th don't you?

A. Yes, it was the 12th.

Q. Do you know Leroy Spearman? I mean Allen Spearman.

A. I have seen him.

Q. Is he the man who was with you coming from Florida? On that occasion?

Mr. Moore: May it please the Court. We would like permission to advise this witness that he is not required to give testimony against himself.

The Court: Overrule your objection.

Mr. Varner: Tell us what happened in regard to your getting this ride from Florida into Alabama?—Well, you got a ride, did you not, from Florida into Alabama?

A. Yes.

[fol. 93] Tell us the circumstances immediately preceding your seeing the driver of that automobile, and continue on with possibly some interruptions as I ask questions.

Mr. Moore: We object to that question as being too vague and indefinite.

Mr. Varner: I was trying to save time. I will ask you then if you didn't see Allen Spearman there on November 14, down there in Florida?

A. Yes.

Q. Tell us exactly when that was? As well as you can remember.

A. It was the day we came out of the swamp.

Q. Where did you first see him? Was he in a car?

A. Yes.

Q. Were you along the highway?

A. We were a little away from town.

Q. Was the car moving or stopped?

A. It was moving.

Q. Did you flag the car or how did you go about it?

A. I think Dick was actually the one who did the flagging. Me and him were standing beside the road, we flagged the car down and stopped him. We got in the car.

Q. Who had the gun at that time?

A. I believe Johnny Ray was carrying the gun.

Q. Do you recall any conversation at that time, in Johnny Ray's presence that took place between you or Dick or Johnny Ray and Spearman.

A. We were sort of in a hurry. We just piled in and took off.

[fol. 94] Q. Spearman was in a hurry?

A. No, we were in a hurry.

Q. What did you tell Spearman?

A. We told him to move over that we were taking the car.

Q. Did you have the gun at that time?

A. Yes.

Q. Did you ask him to get out?

A. No.

Q. Where did you go from there?

A. I tell you truthfully, I don't know where I was. I don't know that part of the country. I had never been down there before.

Q. You do know that you were not over into Alabama, do you not?

A. As far as I know we were in Alabama.

Q. And at that time you had this gun that one of you had taken from the farm house. That is true, isn't it?

A. I suppose so, we had it with us.

Q. And you were in this car that you had told Spearman that you were taking?

A. Yes.

Q. And who was driving the car?

A. I believe Dick Nunn was.

Q. Did Nunn drive all the way?

A. He drove most of the way.

Q. Isn't it true that Johnny Ray took over and started driving after a while?

[fol. 95] A. I couldn't say, I think that Nunn did most of the driving. I won't say he did all of the driving.

Q. Who had most of the conversation with Spearman, who did most of the talking with Spearman?

A. I don't think none of us talked to him very much.

Q. Well, didn't Johnny Ray Smith tell him that you needed the car and for him to move over and let Nunn drive? Isn't that in substance what Johnny Ray told him?

A. Yes.

Q. Did you hear, or didn't you hear Johnny Ray tell Spearman that he had shot a deputy sheriff down in Florida?

A. Not to my knowledge.

Q. Didn't Johnny Ray Smith tell you that?

A. No.

Q. Didn't Johnny Ray Smith tell you that he had burglarized a motel down there in Florida?

A. No, sir. He was charged with some crime down there that he got time for it.

Q. He didn't tell you what that crime was?

A. I think it was armed robbery.

Q. Didn't Johnny Ray Smith tell you about having transported a stolen automobile up into Alabama, or from Alabama into Florida? Earlier?

A. Mr. Moore: We object.

The Court: Sustain the the objection.

Mr. Varner: Well, I will limit that to early in the month of July, 1949?

[fol. 96] A. I didn't know him then.

Q. I will rephrase the question. Did Johnny Ray or did he not, tell you at any time, that during the month of July, the early part of July, 1949, he stole a car and transported it between Alabama and Florida, and burned it?

A. No, sir.

Q. Now, after you left the jail, when was the first time you got something to eat?

A. At a farm house, where we broke in. Actually the first food we had was that turtle.

Q. Will you look at that paper. Is that the statemen you made to Mr. Lill?

A. That is right.

Q. That is on November 20, 1949. Is that the statement you made?

A. I guess it was.

Q. Well you see your signature, you recognize your signature do you not?

A. Yes, sir.

Q. I offer this in evidence.

(Received in evidence and marked Government's Exhibit No. 4.)

Now, you stated that Johnny Ray Smith was sore like the rest of you. What soreness did you have?

A. I didn't write that thing, all I did was to sign it.

Q. You stated that all of you were awfully sore, where were you sore, all over? Were your muscles sore?

A. Yes.

Q. Were you still sore on the day you were apprehended?

A. Yes.

[fol. 97] Q. Where did they send you?

A. To Chillicothe.

Q. Were you still sore when you entered Chillicothe?

A. I laid up here in jail for a week or two.

Q. Were you sore when you came to court here on that Monday morning?

A. I reckon I was.

Q. Were you limping?

A. I don't say I was limping. You don't have to limp to be sore.

Q. Your answer is then no, you were not limping.

A. Not that I know of.

Q. Now, lets go back to the question, when was the first food you ate. You testified you ate the turtle. And you testified that you ate again when you went in that house there in Florida. You got some food, clothing and a gun. Now, when did you next eat?

A. It was later that night.

Q. Was that some of the food that you had taken from this house?

A. Yes.

Q. Do you remember what you got?

A. It was cans of food.

Q. How much of it did you get?

A. Just a few cans. Not very much.

Q. Now, when did you next eat?

A. The next day.

Q. Where?

A. Out in the woods.

[fol. 98] Q. Where did you get that food?

A. From a friend.

Q. Was that in Alabama or in Florida?

A. It was in Alabama I guess.

Q. Did you not eat that night at a friend's house?

A. No. We ate that in the woods.

Q. You ate the food he bought you in the woods.

A. This has been six years ago.

Q. I am asking for your best recollection. Now how many days later was it, that you were apprehended under that hotel?

A. We broke out on the 12th.

Q. You broke out on the 12th and you were apprehended on the 18th under the hotel, now when was it you got that meal at your friend's house? Would you say it was about two days before you were apprehended?

A. It was two or three days.

Q. Your friend gave you other food, did he not. Didn't he give you a sack of food? And you took it into the woods with you and went on to Geneva, Alabama?

A. We laid over in the woods for a day or so.

Q. Did Johnny Ray Smith go with you to that friend's house?

A. Yes, sir.

Q. Did he eat that meal there?

A. We sat down at the table. I guess he ate something, I was pretty hungry and I didn't pay much attention to him. I saw him drink something.

Q. He didn't complain that he wasn't getting any food to you?

[fol. 99] A. No.

Q. Did he tell you that he couldn't eat?

A. Well, he didn't eat none of that stuff we got down at the farm house. I know I was hungry after two and a half days.

Q. What did he say about it?

A. He said his throat hurt.

Q. And now at the friend's house, what did he say then?

A. He didn't say anything.

Q. Who was the man that knew this man, wasn't Johnny Ray Smith the man that made the contact with this friend?

A. Yes.

Q. And you were not with him were you, when he first made that contact?

A. I guess not. No, sir.

Q. When was the first time then, that you saw Johnny Ray eat anything?

A. The only time I ever remember him even trying to eat anything was that day when he drank some coffee or something like that, and the only other time was when he tried to eat that turtle that time.

Q. He tried to eat that turtle?

A. We all tried to eat it, it was pretty rough going. It was just small and gristly. We couldn't eat it.

Q. Now what clothing did you get from that house down there in Florida. Do you remember?

A. I got a suit that is about all.

Q. You didn't take anything else?

A. No, sir.

[fol. 100] Q. Who wore that suit?

A. I did.

Q. Over your windbreaker?

A. Yes.

Q. Did you get anything from this house of this friend besides the food? Did you get some blankets, did you get a quilt?

A. We got a quilt and a blanket, we had two covers. I don't know what kind it was.

Q. Now, you went on from there and you contacted one man, I believe his name was Shoots Driver, is that correct?

A. Yes.

Q. And he told you how to get under the hotel?

A. I didn't make the contact with him.

Q. Who made contact with him?

A. I rapped at the door but he didn't come out then. We went into an alleyway there and Johnny Ray was the one who knew these folks.

Q. Well, Johnny Ray is the only one that lived in that neck of the woods, he knew all these folks?

A. Yes.

Q. And he is the one that made all these contacts?

A. Yes.

Q. Now, you went under the hotel, isn't it true that there are warm pipes under that hotel?

A. I couldn't find them.

Q. Isn't that hotel heated by ducts that go under it?

[fol. 101] A. I could not find any heat under there.

Q. Now, when you had Mr. Spearman, did you at any time blindfold him?

A. Yes, sir.

Q. Spearman was asked to go with you, wasn't he. Somebody in the crowd told him come on lets go, we have got to have transportation, or something to that effect?

A. Yes, sir.

Q. That is correct. Now, did you see Johnny Ray down at Dothan, at any time? Well, I will be more specific, did you see him at a Commissioner's hearing or outside in the hall at the time the Commissioner had a hearing up there?

A. I don't remember any hearing.

Q. Did you go before an elderly gentleman who stated what your rights were to you in Dothan, in the Post Office?

Mr. Moore: I object.

The Court: I sustain the objection.

Mr. Varner: All right. I am not going to pursue it. Now, you didn't see Johnny Ray then until you were brought into the court room, did you?

A. That is right.

Q. Didn't you go in Mr. Davis' office with him?

A. Yes.

Q. Was that before you came into the court room or after?

A. We come into the court room and then we went into the District Attorney's office.

Q. And the three of you were together at that time?

[fol. 102] A. I think so, yes.

Q. Now, is it true, that while you were in there, the District Attorney, or the Assistant District Attorney, whoever was prosecuting, took a book similar to this and read a law out of it, to you?

Mr. Moore: We object to similar to this.

Mr. Varner: For the records, this is Title 18, Section 701 to 1690. Do you recall a book that looked like this that he read to you from (U. S. Code.)

A. He read something to me, I don't remember what it was.

Q. Well, will you listen to this and tell me whether this is in substance what he read to you. "Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away and held for ransom, award or otherwise, except in the case of a minor, by a parent thereof, shall be punished 1. by death, if the kidnapped person has not been liberated unharmed; and if the verdict of the jury shall so recommend, or 2. by imprisonment for any term of years, or for life, if the death penalty is not imposed.". Didn't he read you something like that?

A. I remember he read the first part of that, I don't know how to say it, but he said the punishment would be life or death, maximum.

Q. So when you came into the court room then you were under the impression that what you were pleading guilty to, had a maximum punishment of life or death?

A. That was my impression.

Q. And the three of you were together?

A. I couldn't say, sir. I was pretty shook up.

[fol. 103] Q. By the three of you I mean Richard Dale Nunn, Johnny Ray Smith, and you?

A. Yes, sir, we were all there.

Q. Do you also recall that John Lill, the FBI man was in there?

A. I don't remember.

Q. Do you recall whether Jack Johnson the Deputy Marshal was in there?

A. I don't know.

Mr. Moore: We object.

The Court: I don't see any reason for it, he said he doesn't remember him.

Mr. Varner: We won't need Mr. Johnson. Now, do you remember the highway patrol, Mr. Arthur Mason, was in there?

A. All I remember is the District Attorney and me, that is all I recall.

Q. And Mr. Davis told you, or the prosecutor, told you that you were to be prosecuted for kidnapping, that is correct isn't it?

A. Yes, sir.

Q. During the time that you had Mr. Allen Spearman in the car with you did the four of you stop anywhere to get gas, or drinks, or anything?

A. Yes, sir.

Q. How many times, do your remember?

A. I don't remember.

Q. You did on those occasions stop at little stores or gas stations, did they have groceries inside or not?

A. I don't know if they had anything but bottled pop.

Q. Did you get any chocolates to go with it, or anything of that nature?

A. I believe we did.

[fol. 104] Q. Was there not another gun, a 45 calibre automatic gun that you or Smith or some of you had possession of?

A. Yes.

Q. That was a pistol, not when you had Spearman but sometime when you were out.

A. Yes.

Q. Where did you get that gun?

A. From a guy.

Mr. Moore: I object.

The Court: Sustain the objection.

Mr. Varner: Well I will ask if he got that gun from the same man who furnished you with the two quilts and blanket and the food?

Mr. Moore: I object.

The Court: Sustained.

Mr. Varner: Before you let Mr. Spearman to go, did you see him with any money?

A. He paid for the gas.

Q. Didn't you take some money away from him?

A. I didn't.

Q. Did you see Johnny Ray Smith take some from him?

A. I think he did. I know I seen him give Johnny Ray some money.

Q. Did you hear the conversation that took place at that time?

A. He was going to let him go and he said something about he might need some money to get home, we told him we were going to leave his car down the road a half mile or [fol. 105] so, and told him we needed some money too. And he gave us some money. That was——

Q. That was just before you let him go?

A. No, it was quite early, quite a bit earlier, when we first got him. It was getting dark that is when we blindfolded him. We were away out in the country, we talked over what we were going to do with him, we could let him go now, or we could hold him a couple of hours longer and give him his car back. He said he would stay a couple of hours longer and get his car. We had not hurt the man or anything like that.

Q. Now about what time of night was that?

A. It was real early.

Q. It was at night though?

A. Just getting dark.

Q. And you were on a dirt road?

A. Yes.

Q. Where were you in Blountstown when you picked Spearman up?

A. No.

Q. You had left Blountstown on the highway and driven on up into Alabama somewhere around Geneva, hadn't you?

A. I don't know that part of the country. We drove around an awful lot. And ended up in Geneva.

Q. You had driven on paved roads a long way when you first started, did you not?

A. We drove on paved roads and dirt roads too.

That is all

The Court: Any re-direct?

[fol. 106] Redirect.

Mr. Moore: Yes, sir. Mr. Jenks, you testified a moment ago on direct that you gave the FBI a statement after you discussed with him your crime and punishment. Is this the statement which you gave him?

A. You see he had me in this room.

Q. Who is "he"? Mr. Lill?

A. Yes, sir. He talked to me for awhile, he said if we would cooperate with him, he would tell the Judge that we were not 21 years old, so we thought we would cooperate with him.

Q. That was before you ever made this statement, you made this statement as a result of that promise? Did he supply any words in this statement?

A. He supplied most of them. I can't remember words very well. He supplied most names and dates and wrote the whole thing. He would write something down and say is that about what happened. I would say yes.

Q. How about the names of these people, how did they get in there?

A. He wrote them in.

Q. Do you know them?

A. As far as Dick and Johnny Ray and myself.

Q. He has got somebody named "Jay" in here. J. A. Wylie, do you know anybody named J. A. Wylie?

A. There was this guy referred to as J. I don't know the guy.

Mr. Varner: I would like to say to save time, that his statement is substantially the same here on the stand and

I don't see any reason to go into these names. His statement is the same except the names. I think the names are immaterial just now.

The Court: You do not object to the statement being submitted?

[fol. 107] Mr. Moore: That is correct, your Honor.

Q. When you were in the United States Attorney's office, did he at any time tell you what inveigle meant?

A. No, sir.

Q. Did you know what the word meant?

A. I don't think I did. I know now I think.

Q. Did he give you any legal significance of any harm done?

A. No.

Q. Did he suggest to you the defenses in this case in any manner?

A. No. All we were worried about was whether we wanted a lawyer or not. That is what he kept asking us whether we wanted a lawyer. We kept telling him why did we need a lawyer. We had plead guilty.

Q. Well you though- you had pleaded guilty in Dothan, is that right?

Mr. Varner: We object to his leading the witness, and move to strike it.

Mr. Moore: That is all.

The Court: Mr. Jenks, let me ask you this. Were you in Florida at the time the automobile was stopped and you had a shotgun?

A. Yes, sir.

Q. As I understand your testimony, that Smith had the gun at the time the automobile was stopped?

A. I got the shotgun afterwards. I got the shotgun as soon as the car was stopped I got on the back seat and someone handed me the shotgun.

Q. Did you have the gun when the car was stopped? When it was flagged?

A. No, sir.

Q. One of the other two had it?

[fol. 108] A. Somebody handed it to me as I got on the back seat.

Q. Who flagged the car, or do you know?

A. I did.

Q. You didn't have the gun when you flagged the car, did you?

A. He could have had it.

Q. When he flagged the car, did the car stop?

A. I was watching the car, I didn't pay any attention to what the other two were doing.

Q. Did the automobile stop?

A. Yes, sir.

Q. Who, if you remember, talked to the driver of that car?

A. Nunn.

Q. Were all of you present at that time? You and Smith and Nunn?

A. I think Nunn was thirty or forty feet from the highway.

Q. He was not there. All right. Did you go ahead and get in the car then?

A. Yes, sir.

Q. Did Smith get in the car?

A. Yes, sir.

Q. Did you have any conversation with the driver of the automobile after Smith got in the car?

A. There was some small talk. Told him to keep quiet, not to make any disturbance.

Q. Was Smith there when you told Spearman not to make any disturbance?

A. Yes, sir.

Q. All right, who was driving?

[fol. 109] A. Nunn.

Q. You were in the back seat?

A. Yes, sir.

Q. Where was Smith?

A. By me.

Q. Where was the driver, Spearman? Were you holding the gun on him?

A. No, sir.

Q. Did he go with you voluntarily or did you require him to go by virtue of you having the gun?

A. I guess he took it for granted that we were going to take him.

Q. Did you have any conversation to that effect?

A. There was no conversation, we told him to move over, and he moved over. He didn't stop to argue.

Q. Did you come on into Alabama? From Florida?

A. Yes, sir.

Q. Did you bring the gun into Alabama?

A. Yes, sir.

Q. Was it the same gun you took from that house down in Florida?

A. Yes, sir.

That is all.

Mr. Perry Calhoun, next called as a witness, being duly sworn, testified as follows:

Direct examination.

Mr. Varner:

Q. State your name, please, sir.

[fol. 110] A. Perry Calhoun.

Q. And you are an attorney in Dothan?

A. Yes, sir.

Q. Did you in the month of July, 1949, represent Johnny Ray Smith?

A. I did.

Q. In an extradition proceedings returning him to Florida for crime?

A. Yes, sir.

Q. Have you seen Johnny Ray Smith since that time up until today?

A. Yes, I saw him in Dothan several months after that.

Q. Tell the Court what the occasion was for your having seen him at that time? Was that on November 18, or 19th?

A. Somewhere in that year. I went to the jail house to see another prisoner, is my recollection, and in there, I had read in the paper where Johnny Ray Smith was in jail, and I went and spoke to him.

Q. Did you talk to him about his offense?

A. I didn't do that, as I recall, because I was not employed by him. To my best recollection I did speak to him.

Q. How long did you talk to him, do you remember?

A. Several minutes.

Q. Did he make any complaint to you about his physical condition, at that time?

A. No, he didn't say anything about it.

Q. Was there anything that you noticed to caused you to think there was anything wrong with him?

A. No, sir.

[fol. 111] Q. Did you see him only once?

A. To my best recollection the second time was when the jailor was bringing him down to the second floor.

Q. You didn't talk to him that time?

A. No, I might have spoken to him, I didn't have any words with him.

Q. You observed him at that time?

A. Yes.

Q. You didn't notice any physical handicap at all?

A. I didn't notice any.

Q. You saw him walking, didn't you?

A. I did.

That is all. Your witness.

Cross-examination.

Mr. Moore:

Q. Mr. Calhoun, do you remember that I visited you in your office about two weeks ago?

A. Yes, sir.

Q. At that time did you tell the FBI Agent, John W. Lill called on you about five or six weeks before that and at that time you told him you had no recollection of having seen Johnny Ray Smith in November, 1946?

A. No. I told him, at that time to refresh my recollection, I did not recall it off hand. I did recall just speaking to him as I told you before.

Q. All right, sir. Did you discuss his case with him at all?

A. No, sir.

Q. Did you undertake any relationship as between lawyer and client?

[fol. 112a] A. No, sir.

Q. As you came down did the jailor say some words to you to the effect that you were the only one he would let see him?

A. My recollection is that Mr. Sanders said before you see him you first have to have some kind of authority, either be his attorney or something like that.

Q. Did you have any such authority as that?

A. My recollection I was just visiting a client of mine, and I think out of curiosity, I went in there to see him.

Q. That client you were visiting was not Johnny Ray Smith, was it?

A. No.

Q. Did any people from the jail or any FBI people or any of those people ever contact you and tell you that Johnny Ray Smith wanted you over there?

A. No.

Q. Did they ever call you over the phone and tell you?

A. I won't be positive, about that. I don't think so. I don't have any recollection about that.

Q. Do you have any recollection of a telephone call?

A. I don't remember that.

Q. Where was Johnny Ray Smith incarcerated in the jail, Mr. Calhoun?

A. I think he was on what we call the south side of the jail, which would be back where the most of the prisoners we call bull pen are put.

Q. I believe you said they were bringing him down from the third floor, is that correct?

A. Yes, sir. He was coming down the stairway when I saw him.

[fol. 112b] Mr. Moore: That is all.

Richard Dale Nunn, being next called as a witness, being duly sworn testified as follows:

Direct Examination.

Mr. Moore:

Q. State your name, please sir.

A. Richard D. Nunn.

Q. How old are you, Mr. Nunn?

A. Twenty-three.

Q. At the present time are you incarcerated in a federal institution?

A. Yes, sir.

Q. What is that institution?

A. At Leavenworth.

Q. Were you incarcerated in a jail in Panama City, Florida, Bay County, on November 12, 1949?

A. Yes, sir.

Q. Did you break out of that institution on that night?

A. Yes, sir.

Q. Who all went out with you?

A. Myself, and Jenks, and Johnny Ray Smith.

Q. How did you get out?

A. Through a window.

Q. Who went out first?

A. Mr. Jenks, I think.

Q. Tell me about what happened, if anything.

[fol. 113] A. Jenks went out first and I followed him before the other guy could get out a car pulled up and he pulled the rope back up, after the people and the car got off, around the corner, and he put the rope out and when we come around there we asked him what happened he said he fell. We helped him over the fence and started on.

Q. Where did you go then?

A. In a section of Panama City, Florida.

Q. Then where did you go?

A. We were on the highway going up the road and the police overtaken us.

Q. How long did you ride before he overtook you?

A. I don't know exactly. Maybe half an hour. Just a short time.

Q. Then what happened?

A. We went off to the side of the road and jumped out of the car and went into the swamp.

Q. Did anything happen at that point?

A. We were shot at.

Q. Who all went into the swamp?

A. Myself, Johnny Ray Smith and Jenks.

Q. What was Johnny Ray Smith's physical condition at that time?

A. He was complaining of his side, it kept hurting him. We helped him along, supported him.

Q. Did you go in the swamp?

A. Yes, sir. While we were in the swamp it was raining and damp. We didn't have no place to sleep.

[fol. 114] Q. Did you have any bed clothes or blankets?

A. No.

Q. How were you dressed?

A. I had on khaki pants and shirt, and Jenks had on a sport shirt and pants, and Smith had on a suit.

Q. Did anybody have a top coat?

A. No, sir.

Q. Did you have any food?

A. No, sir.

Q. Was there water in the swamp?

A. In places, yes.

Q. Where did you go?

A. Well we were all there in the swamp that night and the next day. We thought we were lost.

Q. Did you get wet while you were in the swamp?

A. Yes, sir. All of us got wet.

Q. Was it cold?

A. Yes, sir. It was cold and had been raining, too.

Q. Did you have anything to eat while you were in the swamp?

A. We fell upon an old turtle.

Q. Is that the only thing you had?

A. Yes, sir.

Q. About how long did you stay in the swamp?

A. All that night, the next day, and that night and until the next day.

Q. Were you being hunted for during that time?

[fol. 115] A. Yes, we heard the dogs, we also saw planes flying like they were searching for us.

Q. Where did you go when you came out of the swamp?

A. We saw a small house sitting on the side of the swamp with the smoke coming out of the chimney.

Q. Did anybody come out of it?

A. We waited around to see if anybody was in it.

Q. What did you find in the house?

A. I am not sure whether we all went in or not. We found a little food, we managed to eat what we found. We found a shotgun.

Q. Where did you go then?

A. After that we left and went back in the swamp. We

walked for maybe half an hour and come to another house. We started to knocking on the door and somebody asked what we wanted, a man came to the door and told us to go away.

Q. Did you leave?

A. Yes, sir. We went down a dirt road for maybe a couple of miles and saw a car coming and we stopped him.

Q. Were you finally apprehended in Geneva, Alabama? On the 18th?

A. Yes, sir.

Q. During that time did you ever spend the night in doors? Did you stay in the woods all that time?

A. Yes, we went into the woods.

Q. Did you stay out in the woods that entire time and was it cold during that time?

A. Yes, sir.

[fol. 116] Q. How did you go from your last camp down to Geneva?

A. We walked and went part way by boat.

Q. When you got to Geneva where did you go?

A. To the Geneva Hotel.

Q. How long did you stay under there?

A. We stayed under there all that night and until some time in the afternoon the next day.

Q. Did you have any food while you were under the hotel?

A. No, sir.

Q. Was it cold under the hotel?

A. Yes, sir.

Q. What did you do for sleeping during this time?

A. We didn't do much sleeping.

Q. Did you ever try to build a fire?

A. Yes, but we didn't have any luck.

Q. When you would sleep, how did you sleep?

A. Well first one and then the other took turns of being in the middle to keep warm.

Q. During this period of time, what was Johnny Ray Smith's physical condition?

A. It was pretty poor.

Q. How were you feeling?

A. I felt awful, I felt like the world was coming to an end or something. I was hungry and I was tired, our throats were sore, I couldn't eat.

Q. Why couldn't you eat?

[fol. 117] A. Because my throat was sore and it hurt me to eat.

Q. You came out from under the hotel, the Osceola Hotel, sometime in the afternoon of the 18th, is that correct?

A. Yes.

Q. Where were you carried then?

A. Up stairs.

Q. In the hotel?

A. Yes, sir.

Q. How long did you remain there?

A. About an hour.

Q. Then where were you taken?

A. To jail.

Q. What happened there?

A. We were locked up in a cell.

Q. Did you see Johnny Ray Smith any more in Dothan after you left Geneva Alabama?

A. I saw him about five minutes, the day they brought us up here.

Q. In other words, you didn't see him in Dothan at all, is that your testimony?

A. That is right.

Q. When was the first time you saw him after you left Geneva?

A. Here in court.

Q. Is that when you saw him in federal court, was that the next time you saw him?

A. Yes, I think it was in the U.S. Attorney's office, if I am not mistaken.

[fol. 118] Q. While you were incarcerated in jail in Dothan, were you interrogated?

A. Yes, sir.

Q. By whom?

A. Mr. John W. Lill.

Q. Where did he interrogate you, do you remember?

A. The first night I was there.

Q. Did he interrogate you at the same time with Jenks and Smith or separately?

A. Separately.

Q. What was the nature of the conversation which you had with him at that time?

The Court: That is not admissible.

Mr. Moore: At that time did he advise you of any of your rights?

Mr. Davis: We object to that.

The Court: Objection sustained.

Mr. Moore: Did you make a statement to Mr. Lill at that time?

A. Yes.

Q. Was there any reason for you making that statement?

A. Yes, sir.

Q. What?

Mr. Varner: We object.

The Court: Sustain the objection.

Mr. Moore: How long were you in the Dothan jail?

A. I don't know exactly, I think three days.

Q. Did you ever attempt to communicate with anyone while in that jail?

[fol. 119] A. No, I wanted to try an appeal.

Q. Were you ever allowed to do so?

A. No.

Q. Did you attempt to get an attorney while you were there?

Mr. Davis: We object to that.

The Court: Sustained.

Mr. Moore: You were brought from the jail in Dothan, Alabama, to Montgomery, Alabama, what day was that?

A. The 21st.

Q. What time of day were you brought up here?

A. In the morning.

Q. Where were you brought when you first came in here?

A. To the U. S. Attorney's office.

Q. Who was in there?

A. Myself, Johnny Ray Smith, Nunn and the FBI and the U. S. Attorney.

Q. Who was that FBI man?

A. Mr. John Lill.

Q. What transpired at that time?

A. Mr. Lill told the man he had made a mistake, that he had told me something that was not right. That the most time I could get was four years, that he had made a mistake, that he shouldn't have told us that, and the U. S. Attorney told us how much time we could get.

Q. Did you sign a paper at that time?

A. I think so.

Mr. Varner: We object.

[fol. 120] The Court: Overruled.

Mr. Moore: What happened then?

A. Then we were brought in before the Judge.

Q. What transpired before the Judge?

A. He said something about the crime was a very serious offense, and he asked if we had anything to say.

Q. Did the Judge or the United States Attorney either one ever explain the charges to you?

A. I knew nothing about what I was charged with until I saw the United States Attorney. He told us what we were charged with.

Q. Did he go into detail or did he read it to you?

A. Well he said if you harm a man it would be death, but if you released him unharmed the term would be for life.

Q. Did he discuss any possible defenses with you?

A. I don't know.

The Court: Was the gentleman over here, Mr. Smith, in the United States Attorney's office with you when the U.S. Attorney explained what you were charged with?

A. Well, I think all three of us were in there.

Q. That is your best judgment?

A. Yes, sir.

Mr. Moore: That is all.

Cross-examination.

Mr. Varner:

Q. Now, you stated a while ago that you and Jenks, and Smith, and the United States Attorney and Mr. Lill were [fol. 121] in the office there. Is it possible that there were other people there at that time?

A. It is possible, but I don't think there was.

Q. You don't remember two other people? Do you remember that there was an Alabama Highway Patrolman and a Deputy Marshal there?

A. No.

Q. At that time Mr. Lill made the statement to the United States Attorney in your presence and in the presence of whoever else was in there, that he had a mistake and told you that you would be punished as a juvenile, is that correct?

A. Yes.

Q. And the United States Attorney at that time told you that you would *bot* be punished as a juvenile but you would be punished as a kidnapper, is that correct?

A. Yes, sir.

Q. And that was the impression that you were under when you went in court?

A. Yes.

That is all.

The Court: Any redirect?

Mr. Moore: No, sir. That is all.

The Court: We will recess now until 9:00 o'clock in the morning.

On Tuesday morning December 20, 1955, the following was recorded.

The Court: We are taking the testimony on this motion, Mr. Moore, I believe the case is still with you. Who is your next witness?

[fol. 122] Mr. Moore: I want to get straight on some exhibits, if it please the Court, that were not in.

The Court: All right, go ahead.

Mr. Moore: Mr. Varner, I hand you here a letter from the Clerk of the Circuit Court in Panama City, Florida, which outlines the offenses charged in that court, and which you have previously seen.

Mr. Varner: That is true.

The Court: May I see it?

Mr. Moore: Yes, sir.

The Court: This will be admitted in evidence as Movant's Exhibit, on the theory that this is what the Circuit

Clerk of Bay County Florida would testify to, that his records reflected if he had been subpoenaed and if he had appeared.

Mr. Moore: Next is a record which is certified as a true copy, the case of The United States of America against Johnny Ray Smith, Oscar Smith, and James Ray, which was an indictment for the theft of an automobile, which occurred allegedly on or about the 9th day of July, 1949. The record shows that this indictment has been dismissed.

The Court: May I see it. It will admitted and marked Movant's Exhibit. Before you proceed, Mr. District Attorney, I understood yesterday when they called for witnesses that witness Lewis was not present?

Mr. Varner: He is here, your Honor. He was not subpoenaed.

The Court: All right, any order I made yesterday issuing an attachment for that witness is withdrawn, since I understand that the records here do not reflect that he was ever subpoenaed.

[fol. 123] Ed Driggers, called as a witness, being duly sworn, testified as follows:

Direct examination.

Mr. Davis:

Q. State your name, please, sir.
A. Ed Driggers.
Q. Where do you live?
A. In Dothan, Alabama.
Q. What is your occupation?
A. I am a news writer for the Dothan Eagle.
Q. How long have you been so employed?
A. Almost seven years.
Q. Were you so employed from November 12, 1949 through November 25, 1949?
A. Yes.
Q. During that time were you police reporter?
A. I was.
Q. Was that part of your duties?
A. Yes.

Q. In your line of duty as police reporter during that time did you cover an escape, a jail break, in Folrida, which took place in Florida and finally wound up in Alabama, involving a man named Nunn, a man named Jenks, and a Johnny Ray Smith?

A. I did part of it, more or less, I didn't cover the whole thing but I did the latter part of it.

[fol. 124] Q. Your newspaper carried an article on it from the time that they broke out through the time they were brought into Alabama, Montgomery, Alabama, did it not?

A. Yes.

Q. As a matter of fact you had some articles about it about two weeks ago, did you not?

A. We did.

Q. Did you have occasion to see Johnny Ray Smith during the period when you were covering these stories?

A. Yes, I saw him.

Q. Did you see him in the county jail on or about November 20, 1949?

A. I did.

Q. Actually you don't have a Saturday edition, do you? feature story.

A. That would have been on Friday or Saturday, before.

Q. Actuall you don't have a Saturday edition, do you?

A. That is right. It was Friday.

Q. So you saw him after he was brought in, sometime prior to Saturday and wrote your Sunday feature story?

A. I did.

Q. Was it a front page feature story?

A. It was.

Q. Did you carry any pictures?

A. We carried some pictures. I do believe we had a picture of him in that particular edition.

Q. All right, in obtaining that story, you say you did [fol. 125] see Johnny Ray Smith in the jail sometime prior to that time?

A. Yes, sir.

Q. Was he partially unclothed?

A. He was.

Q. Did you have occasion to view his body at that time?

A. I saw Johnny Ray Smith, I did not examine his body, but I did have, as you say, an opportunity to view his body.

Q. Did you see anything unusual when you viewed him?

A. No, I did not. I did not see anything unusual that I can remember, he was just partially undressed from his waist up, but I did not see anything that I would consider unusual.

Q. Do you recall that in your story you used words to this effect to refresh your recollection: "He displayed an injured back which he said was caused when he struck the second floor window after he leaped from the top floor?"

Mr. Moore: We object to his leading his own witness.

The Court: That was for the purpose of refreshing his recollection?

Mr. Davis: Yes, sir.

The Court: Overrule the objection.

A. I know that is in the story, yes.

Q. Your mind was refreshed that that is your story?

A. That is right.

Q. And therefore you must have seen it?

Mr. Moore: We object.

The Court: I sustain the objection. Do you have any independent recollection of it now, Mr. Driggers?

[fol. 126] A. No, sir, I don't. I would have to rely on the fact that the story said that, and that I would have to agree with the story.

Q. Let me ask you this. Does the reading of the story refresh your recollection to the extent that you do remember it?

A. No, sir.

Mr. Moore: We move to exclude it.

The Court: That is excluded.

Cross-examination.

Mr. Moore:

Q. While you were there did you have any conversation with Johnny Ray Smith?

A. I did.

Q. Did he say whether or not he had not had any food, or when he had eaten his last food?

A. I don't remember.

Q. To refresh your recollection further, didn't he tell you in the office that he hadn't had any food for the last twenty-four hours?

Mr. Varner: We object.

The Court: Overruled. He asked him to refresh his recollection as to what he remembered at that time, in November 1949, that is what we are interested in. Not what he wrote in his story or what he told you. You may ask him however what he wrote in his story or what he told you for the purpose of attempting to refresh his recollection. And I understand that is the purpose of the question.

Mr. Moore: Yes, sir.

[fol. 127] A. Will you repeat your question.

Mr. Moore: When I interviewed you previously do you recall telling me that Johnny Ray Smith told you he had not eaten for the last twenty-four hours?

A. No, I don't.

Q. Did you see them offer him a meal while you were in there?

A. I saw some food sitting in the cell, I know that he was not eating, but I was in that jail at the time they were serving supper to all the prisoners. There was some food in his cell.

Q. Was it eaten?

A. No, it wasn't.

Q. What did you write in your newspaper story which paper was published on November 20, 1949? About Johnny Ray Smith's physical condition?

Mr. Varner: We object.

The Court: Sustain the objection.

Mr. Moore: Do you have a copy of the newspaper dated November 20, 1949, at this time?

A. No, I don't.

Mr. Varner: We object, immaterial.

The Court: Overruled, whether he had a copy with him.

Mr. Moore: Could you obtain one?

A. I could get a photostatic copy, I could get our micro-film, I know I could get a copy of the paper.

Q. May it please the Court, I would like to ask to the court to subpena duces tecum to produce a copy of the paper.

The Court: What is the purpose of it?

[fol. 128] A. To refresh his recollection on this man's condition, what it was at that time.

The Court: I want to know the theory of it?

Mr. Moore: I am inclined to let this man go home, I understand he wants to go home, but I also have a duty to my client.

The Court: Your duty to your client comes first. Let's overlook the fact that he wants to go home.

Mr. Moore: Otherwise I am going to keep him here, I want that newspaper to impeach what I think is coming up here, because everybody in that witness room in Dothan, Alabama, should have known he had been convicted because it was carried on the front page of the Dothan Eagle.

The Court: Has that newspaper article that you wrote been available to you and have you read it recently in an effort to refresh your recollection?

A. Yes, sir, with Mr. Moore.

Q. All right. Was that recently?

A. It was within the last two weeks.

Q. Do you have any reason to believe a re-reading of it would refresh your recollection any more than what you have testified to here on the witness stand?

A. No, sir.

The Court: Overrule that, Mr. Moore, I see no reason for it.

Mr. Moore: That is all.

Redirect.

Mr. Varner:

[fol. 129] Mr. Driggers, tell the Court exactly as best you remember, how Johnny Ray Smith was dressed when you saw him?

A. I can't remember whether Johnny Ray had on just

part of his underwear or whether he actually had on his trousers. He was bare from his waist up.

Q. Did you see any blood on him anywhere?

A. No, I didn't.

Q. Did you see him in the rear?

A. I don't recall.

Q. Did he complain to you about any injuries?

A. I don't remember whether he actually complained to me or whether it was to somebody that was there, it was not what I considered complaining, it was more a re-hashing of the escape, from the jail in Bay County, Florida. The fact that an injury to the back was mentioned was more or less incidental to the story he was telling.

Q. Did he complain to you that he was not allowed to see a doctor?

A. No, he did not.

Q. Did he complain to you that he was not allowed to see a lawyer?

A. No, he didn't.

Q. Did he talk freely to you?

A. Rather freely, although we didn't talk long.

Q. Was a law officer present when you were talking to him?

A. I can't remember. There was somebody in the jail or somebody was in the general vicinity, there in the cell block.

Q. Do you recall whether they were within your hearing, or within hearing of you?

[fol. 130] A. No, I don't.

Q. Now, how long did you talk to Johnny Ray Smith?

A. It couldn't have been more than five minutes.

Q. Did you see him on more than one occasion?

A. Only that one time in the jail.

Q. During the time that you were talking to him did he walk around any or was he seated, do you remember?

A. I noticed that he was seated, and I can't recall.

Q. Was there anything to indicate to you that he was injured, that you saw or heard or sensed in any way?

A. With the exception of what I have already mentioned, I have to more or less agree with what the story said. I can't recall it.

Q. You can't testify on that. Do you recall anything that gave you the idea that he was injured?

A. No, I don't.

Q. Do you recall anything that gave you the idea that he was sick in any way?

A. No, sir.

Q. Was his face flushed?

A. Not to my knowledge.

Q. Did he complain to you that they had taken his clothes away from him?

A. No.

Q. Did you carry on a reasonable conversation with him?

A. We did.

Q. Did he answer your questions intelligently?

[fol. 131] A. He did.

Q. And did he converse with you intelligently?

A. Yes, sir.

Q. Was there anything that occurred there indicate to to you that he was not in possession of all his mental faculties?

A. No.

That is all.

Re-cross.

Q. Mr. Moore: What cell was Mr. Smith in Mr. Driggers?

A. I don't know except he was upstairs, he was not in the bull pen he was in a cell by himself, just one of the several cells that they have.

Q. Was that on the second floor?

A. It was; there are no cells on the first floor.

Q. You testified that you had seen him, do you remember if you saw any blood on him?

A. I remember that I did not see any blood.

Q. You testified to the fact that his injuries were mentioned as more or less incidental, do you now recall having seen his injured back.

A. No, I don't recall seeing an injured back.

Q. Your testimony was a conjecture then in answer to that question, is that right?

A. I don't know what you mean.

Q. In other words, you say it in your story and therefore you feel that it must have happened.

A. Certainly, yes, I feel that he must have, because I would not have had it in the story. I would not have [fol 132] imagined it.

The Court: Do you want this witness to remain, Mr. Moore?

Mr. Moore: Yes, your Honor.

Mr. Varner: Mr. Moore is holding him because he can't produce that newspaper article as the Court has ruled on it. Now, I am going to let him have the newspaper article to see if Mr. Moore will be satisfied with the ruling of the Court. We are willing for him to use the newspaper article.

The Court: As I understand it the witness is perusing the newspaper article in question for the purpose of attempting to refresh his recollection as to the events that occurred there on November 18th or 19th, 1949. The newspaper article itself is not admissible and not pertinent.

The Court: Mr. Diggers, now that you have reviewed the newspaper article in question, that is it, is it not?

A. Yes, sir.

Q. Now that you have reviewed it, do you have any independent recollection as to the events that transpired on this occasion earlier than what you have already testified about?

A. I remember something, your Honor, that was not in the story.

Q. All right.

A. It was a conversation that took place. I do not, I ran across a place here where it says that they had not eaten in twenty-four hours. I do not remember this conversation.

The Court: You may examine it further, Mr. Moore, if you wish, or later.

Mr. Moore: Was this article generally circulated in Dothan, Alabama?

[fol. 133] Mr. Varner: We object.

The Court: I sustain the objection. Mr. Moore have you concluded the examination of this witness, and you wish him to remain?

Mr. Moore: Yes, sir.

ALLEN SPEARMAN, called as a witness, being duly sworn, testified as follows:

Direct examination.

Mr. Varner:

Q. Your name is Allen Spearman?
A. Yes, sir.
Q. Do you know Johnny Ray Smith?
A. Yes, sir.
Q. Is he in the Court Room?
A. Yes, sir.
Q. Point him out.
A. (Witness complies.)
Q. Did you have any contact with him on or about November 14, 1949?
A. I did.
Q. Where were you?
A. I was on the outskirts of Blountstown, Florida.
Q. What time of day was it?
A. About 3:00 o'clock in the afternoon.
Q. Tell the Court when you first saw Johnny Ray Smith at that time and the surrounding circumstances?
A. I had driven my car out to the edge of town there [fol. 134] looking for a man's house. I had stopped my car at this little intersection to look down to my right to see if the house was there. It was then I saw these three men standing across the road. And they ran across the road and put the shotgun in the car.

Mr. Moore: We object to any testimony from this witness as to any alleged facts as to the kidnapping.
The Court: Overrule the objection.
Mr. Moore: We except.
The Court: You may proceed.

A. These men came across the road and put a shotgun on me at the point where my car was stopped, then they got in.
Q. Was there any conversation between you and the three men?
A. I was just simply told to move over.
Q. Do you remember who told you?

A. Actually I couldn't say exactly, it was very hurried manner.

Q. You say they put the shotgun on you. Do you mean by that that they threatened you?

Mr. Moore: We object to leading the witness.

The Court: Sustain the objection.

Mr. Varner: I withdraw it. What do you mean now.

A. Well, the shotgun was put in the window, the car window was rolled down, it was laid across there and I was told to move over.

Q. Did you move over?

A. I moved over immediately.

Q. Then what did you do?

A. Then they got in the car and we started off. And I [fol. 135] was asked to give them some directions.

Q. Who asked you for directions? Who was driving?

A. The fellow Nunn was driving.

Q. And you were asked to give him directions. Did you give him directions?

A. I did.

Q. Where did they ask you to direct them to?

A. Up to Highway 90, which was North of where we were.

Q. Did they proceed in that direction?

A. They did.

Q. Where did you go to then?

A. When we got to 90 we went West to the vicinity of Mariana, Florida. Then we turned North through Malone and then across into Alabama to Dothan.

Q. You did go to Dothan?

A. Yes.

Q. From Dothan where did you go?

A. We went North to Ozark and then we went West.

Q. Did you go to Ozark?

A. We didn't go to Ozark, we turned West. We turned West approximately where Camp Rucker is.

Q. Where did you go from there?

A. Well, from there we went into Enterprise.

Q. Up to that time had they made any offer to let you out of the car?

A. No.

[fol. 136] Mr. Moore: We object to that question, it calls for a conclusion of the witness.

The Court: I sustain that objection. You may go into the conversations if you want to. This is being admitted on the theory that it is admissible on the allegation in the petition on Smith's motion that petitioner had been brow beaten and bribed into entering a plea of guilty to a crime that he did not commit.

Mr. Varner: Did Johnny Ray Smith, or any one else, tell you that you could get out of the car at any time up to the point where you hit Dothan, Alabama?

A. No, I was not told that.

Q. You were told to move over?

A. I was told to move over and that if I behaved myself right and didn't try to be a hero of any sort that generally everything would be all right.

Q. Now, did you stop anywhere between the time you got in the car and the time you reached Dothan?

A. I can't remember for sure on that point.

Q. Did you stop anywhere on the trip?

A. Yes, we stopped for gasoline.

Q. On how many occasions?

A. Two that I recall.

Q. Did you recall where you stopped?

A. Once at Enterprise.

Q. In Enterprise?

A. Right at the edge of it.

[fol. 137] Q. Was that a regular filling station or a corner store?

A. That was a filling station.

Q. Did you at that time have anything to eat or drink?

A. No.

Q. Did they?

A. No.

Q. Was anything said to you about anything to eat or drink?

A. Not at that time.

Q. Was that a station where cold drinks were served?

A. Well, I presume it was. I don't know.

Q. You don't remember whether they served food, do you?

A. No.

Q. Now, who paid for the gas?

A. I did. I handed Smith the money, and he paid for the gas.

Q. Did he ask for the money?

The Court: Just let him tell what happened, lets not lead the witness.

Mr. Varner: Now, on another occasion I believe you testified about, do you recall whether or not any one participated in refreshments?

A. The second time we stopped it was a sort of country filling station and I recall that we got cigarettes, and cokes, and I believe we got some crackers or candy there.

Q. And you testified that was a general store?

A. Yes, sir.

Q. On that occasion did any of the men who were with you get out of the car?

[fol. 138] A. No, sir.

Q. Did any of them at any time during the trip complain of being hungry?

A. Yes.

Q. Did they complain of being thirsty?

A. They complained of being thirsty, and hungry, and tired.

Q. Did they tell you anything about what they had done in the past?

Mr. Moore: We object.

The Court: I sustain that objection.

Mr. Varner: Did Johnny Ray Smith have any conversation with you regarding any crime which he may have committed?

Mr. Moore: We object.

The Court: Sustain the objection.

Mr. Varner: Did Johnny Ray Smith have any conversation with you, regarding a case, or his action in shooting a deputy sheriff in Florida?

Mr. Moore: We object.

The Court: Sustain the objection, the way it is phrased. I understand a predicate was laid on cross examination of Johnny Ray Smith, if you will phrase your question properly I will permit you, by virtue of the predicate you laid, to offer testimony along that line.

Mr. Varner: State whether or not you had any conversation with Johnny Ray Smith regarding his having shot a deputy sheriff in Florida?

A. Yes.

Q. State the substance of that conversation?

Mr. Moore: We object.

The Court: Sustain that objection.

[fol. 139] Mr. Varner: Did Johnny Ray Smith tell you at that time this, or this in substance, that he had shot and hit a deputy sheriff in Florida?

Mr. Moore: We object to that question as being vague and indefinite.

The Court: Sustained.

Mr. Varner: Did he, Johnny Ray Smith, tell you at that time, this or this in substance, that he had shot and hit a deputy sheriff named Billy Gilbert in Bay County, Florida during the month of July, 1949?

Mr. Moore: We object.

The Court: Overruled.

Mr. Moore: We reserve exceptions.

A. He stated that in fleeing from a robbery there that he had shot a deputy sheriff named Gilbert.

Q. Did you ever know Johnny Ray Smith previous to this occasion?

A. No, I did not.

Q. Do you recall ever having seen him?

A. I never saw him in my life before that occasion.

Q. Do you recall ever having seen either of the other two men?

A. No, I had never seen any of the three men.

Q. Where were you released?

A. Between Elba and New Brockton.

Q. Where did you later find your car?

A. I called the sheriff from Coffee County and he came and got me and told me he had seen a car that answered my car's description on the way out there. We went on back and it was just there on the outskirts of Elba.

Mr. Varner: Was there anything there that you saw, that [fol. 140] indicated that to you that Johnny Ray Smith was not in possession of all his mental faculties?

A. No, he appeared to be very reasonable with me. The conversation was clear and normal as far as I could determine. He was not suffering from any extreme mental condition.

Q. Was there anything to indicate to you that he was suffering physically?

A. He complained of having cold and being chilled as did the other men I think, too. He also said he had been injured in his escape.

Q. Did he show you his injury?

A. No, sir. I didn't see any injury.

Q. Did you see him walk?

A. Actually not any time except when he came to the car.

Q. Did you or did you not notice him limp at that time?

A. I did not notice him limp.

Q. Did you notice anything to indicate he might have been favoring one of his limbs, or any part of his body?

A. No, sir, I didn't.

Q. Did he walk in a stooped position?

A. No, I was not conscious of that either.

Q. Did you, or did you not, see any blood on his clothing?

A. I didn't see any blood on his clothes.

Cross-examination.

Mr. Moore:

Q. Where did you live at that time, Mr. Spearman?

A. In Dothan, Alabama.

[fol. 141] Q. How long had you resided in Dothan, Mr. Spearman?

A. About two months.

Q. What was the nature of your work?

A. I was with General Motors Acceptance Corporation.

Q. Did your duties carry you out around the town to numbers of places?

A. I didn't work right in Dothan. I worked in Florida.

Q. You travelled back and forth, as a matter of fact, you had an Alabama license plate on your car, didn't you?

A. Yes.

Q. How many steps did you say you saw Johnny Ray Smith take until he got in our car?

A. Just very few. What it would take to come across that road, five or six maybe.

Q. As a matter of fact at that time you had not identified the man by name, had you?

A. No, I didn't know who they were at that time.

Q. You say they complained of being thirsty, hungry and tired, is that right?

A. Yes.

Q. Did Johnny Ray Smith tell you what his injuries were he received when he escaped?

A. I disrecall, he said he had been injured in shimmying down a wall of a jail, is my recollection of that. I believe he had a sheet tied up or something like that and he had come through a hole and he had been injured there and also in shimmying down the wall of the jail.

[fol. 142] Q. As a matter of fact, this was some six years ago, wasn't it?

A. That is right.

Q. Is your recollection completely fresh on all these details?

A. Not on such details as that.

Q. Could it be possible that during this ride that Johnny Ray Smith told you that he was accused of shooting a deputy sheriff there in Florida? That he was indicted in Florida along with two other men?

A. Yes, it was possible, but it was as I have already stated, he said he shot the sheriff.

Q. Is it possible that he told you that he was *accused* of it, is that right?

A. It is possible, that he said he was accused of it.

Q. When you were first picked up, I believe you said you first went to Dothan, Alabama, is that correct?

A. Well, we had to get to Highway 90, I said, which is north of Blountstown. We went west on that highway, and turned north off that highway, and to Malone and to Dothan.

Q. That is Houston County, Alabama, isn't it?

A. That is right.

Q. Then did you return to Florida from that point?

A. No, we didn't go back in the State of Florida after we left it.

Q. Are you quite positive that you didn't?

A. Well, unless it was during the period of time in which

I was blindfolded and was not conscious of where we were going.

Q. Is it possible that you might have gone back to Florida at that time, isn't it?

[fol. 143] Q. At that time you say you might have gone back into Florida, did you have any conversation with Johnny Ray Smith during that period of time, was the vehicle stopped at this particular time we are talking about after you had been blindfolded?

A. I don't understand you.

Q. Was the car stopped?

A. Yes, on numbers of occasions we stopped.

Q. Was there any conversation between you and Smith at that time?

A. Yes, we talked generally about one thing and another.

Q. Did you talk specifically at that time about the possibilities of *of* you staying there at that point? Whether it was Florida or Alabama, where ever it was? After you had been bliindfolded and the car was stopped.

A. There was a time we stopped at a clearing, where it looked like some pulp wooder had cut trees down, and Smith and Nunn I believe it was, got out of the car and a conversation some distance behind the car, and when they came back they announced that they had discussed leaving me there. Perhaps tied up in the woods but I remember Smith said he didn't want to see the rattlesnakes get me, so they would just take me on with them.

Q. At that time, do you remember when the car was stopped at night and Jenks and Nunn got out of the car and left you and Johnny Ray Smith, left you and Johnny Ray Smith on the front seat?

A. I recall a time like that. A time when some of them were gone and I was left with one.

Q. Do you recall what weapons did they have?

A. They had a shotgun.

[fol. 144] Q. Is that all they had?

A. That is all I saw.

Q. During that time when you were left with Johnny Ray did you excuse yourself and go in the bushes to relieve nature.

A. I couldn't say whether I did or not.

Q. Is it possible that you did?

A. I don't recall it at that time. I recall it at another time. It is possible of course.

Q. When you got out of the car, did you say words to this effect, "Good luck, Johnny Ray."

Mr. Davis: We object.

The Court: Overruled.

A. When they released me I told him that I wished him luck and I hoped he wouldn't get hurt. I did.

Q. Was it a Company automobile that you were driving?

A. It was.

Q. Do you feel responsibility for the Company's car?

A. I felt my responsibility.

Mr. Varner: We object.

The Court: Sustain that objection.

Mr. Moore: That is the last question.

The Court: That is all right, take all the time necessary.

Q. Did you have any conversation with Johnny Ray Smith about whether you were or were not going to report that crime?

Mr. Davis: We object.

[fol. 145] The Court: I sustain the objection.

Mr. Moore: Do you recall a conversation between you and Johnny Ray Smith, in which you told him you were driving a company car and that you would like to *that* the car back?

A. I recall saying it was a company car, that I didn't want to hurt it or anything like that. Of course, I did say that I would like to have it back, I recall that too.

Q. Do you recall that time that they assured you that you were not going to be hurt?

Mr. Davis: We object.

The Court: Overruled.

A. I don't recall that particular time. I was later assured that I was not going to be hurt.

Q. Do you recall that they assured you that you were not going to be hurt and that you would get your automobile back?

A. No, I don't recall that. As I say, I separate the two

in my mind, the possibility of me being hurt and as to the automobile, I don't associate the two together through the whole thing.

Q. But you do recall saying that you would like to get the automobile back?

A. That is right.

Q. At that time did you make a statement that they could take the car, you would give it to them?

Mr. Davis: We object.

The Court: Overruled.

Mr. Moore: Did you tell them you would go along to get the car back?

A. Did I tell them I would go to get my car back?

[fol. 146] Mr Davis: We object.

The Court: The question is whether or not this man came voluntarily or whether he was forced to come.

Mr. Moore: Did this conversation take place right after you had been blindfolded?

A. No. We talked about the car. The only time we talked about my coming after the automobile was when he told me at the time of my release that it would be up the road a few miles, and as he put it, "You could start walking after it, or go in the opposite direction, either way you want to." The only time I really ever gave any thought absolutely about going after the car one way or the other. There was no occasion to think of it prior to that.

Q. When you were down there in the woods and they discussed leaving you at that time, did you remind them it was a Company car and you would like to have it back? The time when they said they didn't want the rattlesnakes to get you?

A. No. I don't recall no conversation about that then.

Q. When you were sitting down there in the woods with Johnny Ray Smith, and these other two boys were out of the automobile, and the shotgun was on the back seat, do you recall at that time that your had a conversation with Johnny Ray Smith, at which time you told him you were not going to report them?

Mr. Davis: We object.

The Court: Objection sustained.

Mr. Moore: Did you have such a conversation?

[fol. 147] Mr. Davis: We object.

The Court: Objection sustained.

Mr. Moore: Was the shotgun on the back seat at the time you talked to Johnny Ray Smith when the other two boys were out of the car?

Mr. Davis: We object.

The Court: Overruled.

A. As I stated when you asked first question that it isn't clear in my mind about that particular time, whether they were both gone at the time, or just what it was. To my memory I recall only being left in the car only once with any one of the men, although I can't be sure of that. And as to where the shotgun would be in the car, I can't say too much about that either. I can't tell too much about what happened at that time.

Q. At the time when car was stopped after your blindfold was removed did you have a conversation with Johnny Ray Smith when you told him you were not going to report them?

Mr. Davis: We object.

The Court: Sustained.

Mr. Moore: That is all.

Robert Crongeyer, being called as a witness, being duly sworn, testified as follows:

Direct examination.

Mr. Varner:

Q. Your name is Robert Crongeyer?

A. Right.

Q. You are a special agent for the FBI?

[fol. 148] A. That is right.

Q. And you were such on November 14, 1949?

A. That is correct.

Q. Did you participate in an investigation involving one Johnny Ray Smith in Geneva at that time?

A. Yes, sir.

Q. Do you know Johnny Ray Smith?

A. I do.

Q. Is he here in the court room?

A. Yes, sir, that is right.

Q. Will you point him out?

A. The gentleman over there with the glasses on.

Q. Did you see him on November 18, 1949?

A. Yes, sir.

Q. Where did you see him?

A. In the Geneva Hotel, at Geneva, Alabama.

Q. In what part of the hotel did you first see him?

A. I first saw him in the men's room on the main floor of the hotel in Geneva. He came up from underneath the hotel through a trap door in the floor of the men's room. He called and said, he was Johnny Ray Smith, and he was coming on out. He started to poking a shotgun up through the opening there, and we ordered him to turn the gun around and send it up with the stock first.

Q. Did he do that?

A. He did that and I took the gun from him and then he came on out.

[fol. 149] Q. What was the condition of his clothes at that time?

A. They were very dirty and covered with cobwebs and dirt and soot, gathered from being under the hotel.

Q. What sort of clothes did he have on.

A. To my best recollection he had a pair of slacks on, shoes and socks and a shirt. It seems to me it was a flannel shirt or sport shirt of some kind. A long sleeved shirt.

Q. Did you notice any blood on him any where?

A. I did not.

Q. Did you look him over good when he came out?

A. Yes, we searched them, not a stripped search but we gave them a frisk, there were people in the lobby so we just gave them a frisk.

Q. Did you frisk his legs as well as the rest of his body?

A. That is right.

Q. Did he at that time, or at any time, make any statement to you relative to his having any soreness of his limbs?

A. No, sir.

Q. Any injury to his limbs?

A. No, sir.

Q. Did he limp at that time?

A. I did not observe any limp, no, sir.

Q. Did he make any statement to you relative to any injuries of himself at any place?

A. No, sir, He did not.

Q. Where did you go from the lobby of the hotel?

[fol. 150] A. After we searched them and put the cuffs on them we sat down in the lobby for probably five or ten minutes at the most. Then as other agents came in we then took them upstairs, to a room up there, on the next floor of the hotel.

Q. Were Nunn and Jenks with him at that time?

A. No, they were not.

Q. What did you do when you got to the room?

A. He was given permission to wash up.

Q. Do you mean by that wash his face and hands?

A. That is right.

Q. What next?

A. The hand cuffs were removed and he washed up and freshened up. He indicated that he was hungry and one of the agents went down stairs and brought up a hot meal from the kitchen in the hotel, which he ate there in the room.

Q. At what time was it when you arrested him?

A. We arrested him to my best recollection it was around noon time, I just don't recall just what hour. I imagine he got his meal within ten minutes, or maybe twenty minutes after he was arrested.

Q. Did you say that he ate that meal?

A. He ate all of it.

Q. Did he eat it in your presence?

A. Yes, sir.

Q. Was there anything to indicate to you that he had any difficulty in eating that meal?

[fol. 151] A. No, sir.

Mr. Moore: We object.

The Court: Sustain the objection.

Mr. Varner: We withdraw that. Well, did he eat slowly or did he eat rapidly if you recall?

A. He ate it as a man who was hungry would eat, I would say.

Q. Were you present when he was questioned relative to any offenses?

A. I was present when he was questioned as to the whereabouts of Nunn and Jenks. That was the only questions I heard while I was in the room.

Q. Were you present any time thereafter that when he was questioned?

A. No, I was not.

Cross-examination.

Mr. Moore:

Q. What was your name, please sir.

A. Robert L. Crongeyer.

Q. Where do you reside?

A. At the present time in Pensacola, Florida.

Q. Where were you residing at the time of this arrest?

A. I was in Mobile, Alabama.

Q. Did you return to Mobile after the arrest of Johnny Ray Smith?

A. I returned that night, as I recall. We went on over to Dothan.

Q. Did you help carry some prisoners to Dothan?

A. Yes.

Q. Who did you carry over there?

A. I believe it was Nunn to my best recollection. I rode in the car with Nunn.

[fol. 152] Q. You are sure it was not Johnny Ray Smith?

A. I am sure it was not.

Q. Did you ever see Johnny Ray Smith any more after you saw him in Dothan, Alabama?

A. Yes, I saw him over at Dothan, Alabama where they had the arraignment.

Q. What took place at that arraignment?

A. I don't work up in that section and I am not familiar with the officials over there, I believe it was the Commissioner.

Q. Is he here today?

A. I don't know.

Q. Do you recall the nature of the conversation between the Commissioner and Johnny Ray Smith?

A. I do not.

Q. Do you recall whether Johnny Ray Smith had a coat on when he came out from under the hotel?

A. To my best recollection he did not have a coat on.

Q. Is it your testimony that he was clad only in pants and shirt?

A. I believe it was pants and shirt.

Q. You say we, who is we?

A. That would be myself together with Agent Dunlap, and Creason. That was Homer Dunlap.

Q. When he came up through the hole there in the latrine, in the rest room you say he was taken in the lobby, is that correct?

A. Yes.

[fol. 153] Q. Where you sat in a chair and handcuffed him?

A. That is right.

Q. Who carried him upstairs?

A. Well the arresting officers, Mr. Creason, Mr. Dunlap and myself, and several local officers, whom I don't recall. I believe Detective Lewis was one of the officers.

Q. Did you at any time ever observe Johnny Ray Smith's body without clothing on?

A. No, I did not.

Q. Did you take part in the questioning which occurred upstairs?

A. No. I did not.

Q. Who did that?

A. I believe that was Mr. Lill and the agent who was in charge of our office at that time, who was John Williams.

Q. Is he the agent in charge out of Mobile?

A. He was at that time.

Q. You said Johnny Ray Smith indicated that he was hungry. Did he tell you he was, or did you observe it from his physical condition?

A. He said he was hungry, that he hadn't eaten a good meal for sometime, that they had been living in the swamp, and eating the animals that they picked up.

Q. What was his mental condition would you say towards his arrest?

A. My best recollection is, that he said he was glad it was over. He was tired of running, he seemed to be relieved.

Q. Would you say he was sad, tragic, glad, gay, happy?

[fol. 154] A. Well, he seemed to be very greatly relieved that it was all over. He was tired of running, he seemed to

be in a—he joked with some of the officers there. I recall that up in the room he joked with Detective Lewis, and asked him if he wasn't going to let him have his gun, and things of that sort.

Q. Is that what you recall or what you read out of a transcript of what occurred in California.

A. No. I recall that when he was in the room, that he was joking.

Q. Did you read the California transcript?

A. Partly.

Q. Did you read Mr. Lill's testimony?

A. Yes, sir.

Q. Do you recall Mr. Lill having said the same thing in the transcript?

A. I do.

Q. Was your recollection refreshed by Mr. Lill's testimony or do you have an independent recollection of that taking place.

A. I have an independent recollection of that taking place.

Q. Did Johnny Ray Smith appear to be tired?

A. No, he walked briskly, there was no indication that he was overly tired. Of course, we were all tired, too. We had worked all that night.

Mr. Davis: He had been resting while you were running him, hadn't he?

A. I guess so.

Q. Was there any doubt in your mind that he had been on foot and exposed for the last six days?

A. That is right.

[fol. 155] Q. Did he appear to be a man who was fatigued, mentally fatigued and bodily fatigued as the result of the long

A. No, I would say he was mentally alert. He was alert to all the questions we asked him, he gave prompt and alert answers to the questions. I don't think there was anything wrong with his mind at the time, as far as I could ascertain from questioning him.

Q. Did he appear to be as bright as he would have been if he had not been through what he had for the last six days?

Mr. Varner: We object.

The Court: Overruled.

A. Well, I didn't know the man prior to the time he was arrested, so I don't know what his mental capabilities were.

Q. That is all.

The Court: Any re-direct?

Mr. Varner: No, sir. We call Mr. Gilbert.

BILLY GILBERT, being called as a witness, being duly sworn, testified as follows:

Direct examination.

MR. VARNER:

Q. Your name is Billy Gilbert?

A. Yes, sir.

Q. You are deputy sheriff of Bay County, Florida?

A. No, sir, not at the present time.

Q. Were you deputy sheriff of Bay County, Florida, on July 12, 1949?

A. I was.

[fol. 156] Q. Do you know Johnny Ray Smith?

A. Yes, sir.

Q. Is he here in the court room?

A. Yes.

Q. Do you see him?

A. Yes, the man over there with the glasses on.

Q. Did you know him on or about July 12, 1949?

A. No. I don't believe it was on July 12th.

Q. Did you participate in an investigation in July of 1949 of a robbery of Edge Water Beach Apartments in Panama City, Florida, or burglary of these apartments?

Mr. Moore: We object, irrelevant and immaterial.

The Court: Overruled.

Mr. Varner: Did you understand my question?

A. No, sir. I didn't understand it.

Q. Did you participate in an investigation of the burglary or armed robbery of the Edgewater Beach Apartment in Panama City, July 9, 1949?

Mr. Moore: We object.

The Court: Overrule your objection. Go ahead.

A. After I was released from the hospital in July of '49 I participated in an investigation of the robbery.

Q. Did you or did you not pursue a car on the day the Edgewater Beach Apartments were robbed?

A. I did.

Q. Will you tell the Court about that?

[fol. 157] A. Would you like for me to start from the beginning?

Q. Yes, start from the beginning.

Mr. Moore: We object.

The Court: Sustain that objection.

Mr. Varner: Well, from the time that you were first notified to proceed after it.

Mr. Moore: We object.

The Court Sustain that.

Mr. Varner: I need to tell him when to start from, your Honor.

The Court: The issue, as far as this particular aspect of the case is concerned, is whether or not the Movant, Johnny Ray Smith, attempted murder of an officer of the law, to wit: one Bill Gilbert, a deputy Sheriff in Panama City Florida; that is the issue in the case, as far as this particular aspect is concerned.

Mr. Varner: Mr. Gilbert, I will ask you whether or not while pursuing that car, you were shot?

A. Yes, sir.

Mr. Moore: We object.

The Court: Overruled, if you will connect it up.

Mr. Varner: Do you now know who shot you?

A. According to Mr. Smith's own admission I do.

Q. Let me qualify that. Did Mr. Smith make any statement to you relative to your being shot?

A. He did.

Q. On what occasion?

[fol. 158] A. I walked back into the jail near the cell where Mr. Smith was placed after being brought down from

Bay County, and at that time I had my right arm in a sling, and Mr. Smith kind or gave me a——

Mr. Varner: All right. Who was with you?

A. No one was with me at that time.

Q. Just you and Smith?

A. No, sir, I believe Mr. Oscar Smith, or Buck Smith, and Mr. Driver were in the cell with Mr. Johnny Ray Smith. I am not sure but I believe they were all three in this one cell.

The Court: Now, establish the time.

Mr. Varner: That was in Panama City Florida?

A. Yes, sir.

Q. On what day was this?

A. I don't remember the exact day; but it was the day they were placed in the Bay County jail, after being brought down from Alabama. It was in July.

Q. Do you remember the approximate time?

A. I would say between two and three o'clock in the afternoon.

The Court: Now what year was this in?

A. 1949. July.

Q. Did anybody in your presence or within your hearing offer him any threats or any promises to get him to make a statement?

A. No, sir.

Mr. Moore: We object to this, your Honor.

The Court: Overruled.

[fol. 159] Mr. Varner: Was the statement he made to you made freely and voluntarily?

A. It was.

Q. What did he say?

A. I walked back to the corner of the cell there, and as I stated before, my arm was still in a sling. Mr. Smith said to me, kind of laughing——

Q. Which Mr. Smith?

A. Johnny Ray Smith, he said "Who was the boy that got shot?" I said, "I was." He kind of giggled and said: "I didn't mean to hurt you so bad." And I turned and walked out.

That is all.

The Court: Any cross examination?

CROSS EXAMINATION

Mr. Moore: Your Honor, we move to exclude this witnesses' testimony on the grounds that it is not connected up any way to show that that is what Mr. Lill told the Judge, on which is one of the grounds of this motion. It is the same incident which Mr. Lill told the Judge about which is the ground of this motion. I will say it again. I move to exclude this witnesses testimony on the grounds therefor, showing to the court that the incident which this man is talking about is not described, it is not placed when or where he got shot. Further-more there is no showing that the incident which he is referring to is the same incident which Mr. Lill told to Judge Kennamer.

The Court: Your name is Billy Gilbert or Bill Gilbert?

A. Bill Gilbert.

Q. And when were you shot on this occasion that you have just testified about?

[fol. 160] A. On July 10, on the morning of July 10, 1949.

Q. And where were you shot?

A. The location is approximately I would say twelve or fifteen miles west of Panama City on Highway 98, or state road 30.

Q. And if you know what type of weapon were you shot with?

A. According to the gun that was brought down to me, it was a 44 calibre.

Mr. Moore: We object.

The Court: I sustain that objection. That answer will be excluded. Were you shot with a small bore weapon or with a shotgun or do you know?

A. I was shot with a small bore pistol.

Q. And from what point from where you were standing or sitting at the time you were shot was the person that fired the shot?

A. On my right, we were both riding.

Q. How far away from you, approximately?

A. I would say approximately 8 to 10 feet. Both automobiles were traveling in the same westerly direction at a high rate of speed in this position.

The Court: The motion is overruled.

Mr. Moore: Did you ever attempt to take any statement from Johnny Ray Smith?

A. No, sir.

Q. Was that the only conversation you had with him?

A. The only conversation that date.

Q. Is that the only conversation you had with him about this incident?

A. I don't remember that Johnny Ray Smith and I ever discussed this incident after that. Now, I had conversa- [fol. 161] tions with Mr. Smith in jail, but not concerning this. I don't remember having any with him concerning this incident.

Q. Did you ever tell him if you caught him out in the woods you would kill him?

A. No, sir.

Q. Did you ever threaten him?

Mr. Varner: We object.

The Court: Overruled.

A. No, sir.

Q. Were the other boys in the cell laughing on this alleged incident which you described occurred?

Mr. Varner: We object.

The Court: Overruled.

Q. Were these other boys in the cell? You said Buck Smith and Mr. Driver

A. I say I believe they were. I wouldn't be for sure, but I think they were all three in the cell.

Q. Did the other participants of the cell laugh and enjoy the joke?

A. No, sir.

Q. Johnny Ray was the only man laughing?

A. That is right.

Q. Were there any other prisoners in there with these three?

A. I don't remember.

Q. Could there have been?

A. There could have been, I don't remember.

Q. What time on July 10, were you shot?

[fol. 162] A. I would say it was approximately 1:00 o'clock, a.m., I am not sure but I believe it was about that time.

Q. Did you identify the man on the night in question? Did you ever see Johnny Ray Smith on the night of July 10, 1949?

A. Not to know him as Johnny Ray Smith.

That is all.

The Court: Any further——

Mr. Varner: We call Mr. Harold Hayes. He could (Gilbert) be excused.

Mr. Moore: May it please the Court, before this witness comes in, in order to keep from prejudicing the other witnesses, I would like to put Mr. Varner on notice that I have no intention of excusing any of these people freely and voluntarily.

The Court: I understand.

Mr. Moore: Thank you, sir.

Mr. Varner: Call Mr. Hayes.

HAROLD HAYES, being called as a witness, being duly sworn, testified as follows:

Direct examination.

Mr. Varner:

Q. Your name is Harold Hayes, you are with the State Highway Patrol?

A. Yes, sir.

Q. Were you such on November 18, 1949?

A. Yes, sir.

Q. Where were you at that time stationed?

A. In Geneva.

Q. Did you participate in the apprehension of one Johnny Ray Smith?

[fol. 163] A. Yes, sir.

Q. And that was on that day, November 18, 1949?

A. Yes, sir.

Q. Where was he when he was apprehended?

A. In the basement of the Osceola Hotel in Geneva, under the floor.

Q. Do they have an actual dug out space?

A. No, sir. It is a space of two or three feet from the ground to the floor.

Q. You do know Johnny Ray Smith, do you not?

A. Yes, sir.

Q. Would you point him out if you see him here in the court room?

A. Yes, sir. That is he in the middle.

Q. When did you first see Johnny Ray Smith?

A. In July of 1949.

Q. When did you next see him?

A. It was sometime later in 1949 at Panama City.

Q. When you saw him in July did he make any statement in your presence regarding the shooting of one deputy sheriff in Florida?

A. No, sir.

Q. He did not make any statement in your presence regarding that?

A. No, sir.

Q. Now, on November 18, 1949, where did you first see him?

A. He was in, I guess you call it the lobby, of the hotel.

Q. About what time of day was it?

A. I would say between 1:00 and 2:00 o'clock.

[fol. 164] Q. Did you talk to him or hear anybody else talk to him?

A. I heard somebody else talk to him.

Q. Over how long a period of time?

A. Five to ten minutes.

Q. In the lobby?

A. No, sir, in the room there.

Q. In what regard was that conversation?

Mr. Morre: We object, your Honor.

The Court: Sustain that objection.

Mr. Varner: Did you hear Johnny Ray Smith talk to other people?

A. Yes, sir.

Q. Did he answer their questions in an alert manner?

A. Yes, sir.

Q. Did you hear him make any complaints about his physical condition at that time?

A. He said he was hungry.

Q. Do you know whether or not he received anything to eat?

A. Yes, sir. He did.

Q. Do you know whether or not he ate?

A. Yes, sir.

Q. What did he eat?

A. He was brought a plate from the hotel dining room. I recall it had roast beef, mashed potatoes, english peas.

Q. Do you recall whether or not he ate it?

A. Yes, sir.

[fol. 165] Q. Did he eat it fast or slowly?

A. Normally, I would say.

Q. Did you notice anything about him which indicated that he might have any physical handicap?

A. He made the statement or something regarding the hole he escaped from as being small, having to squeeze through there.

Q. Did he state that he hurt himself?

A. He stated that he had scratched himself, or bruised himself in some manner coming through the hole in which he escaped.

Q. Did he ask for a doctor to attend his wounds?

A. No, sir.

Q. Did he show anybody the wounds?

A. Not while I was in the room.

Q. Did you notice whether or not he was limping?

A. At the time I was in his presence he was not in action.

Q. Did you notice the condition of his clothes at that time?

A. Yes, sir.

Q. What was the condtion of his clothes?

A. They were pretty dirty. Not very well kept.

Q. Did you notice any stains on his clothes? And blood stains on his clothes?

A. No, sir.

Your witness.

Cross-examination.

Mr. Moore:

Q. Mr. Hayes, while you observed Johnny Ray Smith, [fol. 166] how long were you around?

A. Five or ten minutes, maybe fifteen minutes.

Q. Did you go upstairs when they took him upstairs?

A. Yes, sir.

Q. How long was he up there?

A. He told us the other boys had left and he described the car and location where it was taken.

Q. Were you with him for thirty minutes?

A. No. I left to make a house to house canvas to see if any vehicle had been taken from the location where he said one had been taken.

Q. You were with him how long?

A. At the most I would say fifteen minutes.

Q. You testified that it was five or ten minutes, didn't you?

A. No, I said where I first saw him, in the lobby when he came from under the house.

Q. You were with him that ten minutes?

A. Altogether from the time he first came in through the lobby up to the room approximately ten minutes, at most fifteen.

Q. When did you leave?

A. Approximately ten minutes after I first saw him.

Q. So you left as soon as he got in the room?

A. No. He was taken directly from the lobby to the room.

Q. When he came into the hotel how long did he stay in the lobby?

A. He was taken immediately to the room.

Q. He didn't get to stay there very long?

[fol. 167] A. No.

Q. You went on upstairs with him to the room?

A. Yes, sir.

Q. You were with him altogether ten minutes at that time?

A. That is right.

Q. After you made that house to house canvas you came back. How long were you with him then?

A. They had already taken him to Dothan.

Q. In other words, you were with him ten minutes from the time he was in the lobby until he was upstairs and you left?

A. Yes, sir.

Q. And during that time he ate a heavy, hearty, substantial meal, hot meal?

A. Yes, sir, he did.

Q. He was a fast eater, wasn't he?

A. Yes, sir. He did very well. It was brought up immediately.

Q. If Mr. Crongeyer said he stayed in the lobby five or ten minutes he is wrong?

Mr. Davis: We object.

The Court: The question is argumentative, sustain the objection.

Mr. Moore: During that time you saw him did Johnny Ray Smith walk with a limp?

A. At the time I saw him there were several people blocking my vision, all I know about his physical condition is what he stated.

Q. To refresh your recollection didn't I visit your home [fol. 168] in Geneva about two weeks ago?

A. Yes, sir.

Q. While we were sitting in your living room smoking cigarettes didn't you tell me Johnny Ray Smith walked with a slight limp, didn't you tell me that?

A. It is a possibility that I did, but as to testifying that he did, no better than I saw him in operation, I could not.

Q. Didn't you tell me that?

A. I can't remember it.

Q. You remember me being there, do you not?

A. Yes, sir.

Q. You don't remember telling me that he walked with a limp?

A. No, sir.

Q. Mr. Hayes, have you discussed the case with the FBI?

A. Yes, sir.

Q. With Mr. John Lill?

A. Yes, sir.

Q. Was this matter of a limp discussed?

A. No, sir. We discussed the entire thing. He asked me what I could remember in regard to the case.

Q. Had you ever told him before then that Johnny Ray Walked with a slight limp?

A. No, sir.

Q. Did you tell Mr. Varner that he walked with a limp?

A. If he walked with a limp it was very slight.

[fol. 169] Mr. Varner: We object.

The Court: Overruled, this is cross examination. go ahead.

Q. But you told him that he walked with a limp, didn't you?

A. The limp that he could possibly have had

Q. We are not talking about the limp. We are talking about you saying it. Didn't you tell Mr. Varner Johnny Ray walked with a limp?

A. It was my impression at the time that he could possibly have had a limp.

Q. Your impression has been charged by the FBI hasn't it?

A. No, sir.

Q. Who has changed it?

A. It is not necessarily changed.

Q. Do you still think Johnny Ray had a slight limp?

A. It is possible. To say definitely that he did, as many people as there was around him at the time he was taken from the lobby to the hotel room.

Q. Was he rushed upstairs?

A. Fairly swift.

Q. Who carried him?

A. I don't remember there were several agents and quite a few law enforcements officers present at the time.

Q. Well, he could have had a slight limp, couldn't he?

A. He could have.

Q. Did you ever see him without his clothes on?

A. No, sir.

Q. You don't know the condition of his body, do you?

[fol. 170] A. No, sir.

Q. Did you ever *ever* talk with him other than his conversation you heard in the room?

A. No, sir.

Q. You say Johnny Ray made a statement that he was scratched when he came out of the hole. Where did he make that statement?

A. He made that statement in the hotel room.

Q. Up in the interrogation room?

A. He also made a statement that he was glad that it was over, that he was tired of running.

Q. Did he appear to be tired to you?

A. No more than I was.

Q. Were you tired?

A. Yes, sir.

Q. How long had you been working on the case?

A. About four of five days, maybe six.

Q. You had been riding all the time, thought hadn't you?

A. Part of it had been in the woods.

Q. Nobody was chasing you though?

A. No, sir.

Q. You were still tired?

A. Yes, sir.

Q. Who was present when he said he came out of a small hole and was scratched and bruised?

A. There were several men in the room I can't recall who all of them was.

[fol. 171] Q. Was Mr. John Lill one of them?

A. Yes, sir.

Q. Was Mr. Crongeyer one of them?

A. I don't remember definitely whether he was or not. There were eight or ten agents present plus that many deputies.

Q. When was the last time you discussed the matter with the FBI? With Mr. Lill?

A. Yesterday.

Q. While you were in the witness room?

A. No, sir.

Q. Where were you?

A. In the hall.

Q. Was that before the trial started?

A. Yes, sir.

That is all.

MR. TULLIS EASTERLING, being called as a witness, being duly sworn, testified as follows:

Direct examination.

Mr. Varner:

Q. Your name is Tullis Easterling?
A. That is correct.
Q. You are Special Agent for the FBI?
A. Yes, sir.
Q. Did you participate in an investigation of a kidnapping case involving Johnny Ray Smith, Richard Dale Nunn and [fol. 172] Robert Peter Jenks, around Geneva in November of 1949?
A. I did.
Q. When did you first see Johnny Ray Smith on that occasion?
A. I believe on November 19, 1949.
Q. Where?
A. On the ground floor of the Oceola Hotel at Geneva, Alabama.
Q. When did you previously last see Johnny Ray Smith?
A. I had previously seen him last I believe I haw him one time in the County jail at Panama City, Florida, after the trial in which he was tried for armed robbery in Bay County.
Q. Was that, or was it not, the armed robbery of the Edgewater Beach Apartments?
A. It was.
Q. Was he convicted?

Mr. Moore: We object.

The Court: It is in the record. Sustain the objection.

Mr. Varner: Now, previous to that, when had you last seen him?

A. I saw him during the trial.
Q. When did you last see him in Dothan, if at all.
A. I accompanied Special Agent Lilf to the County jail in Dothan immediately after he was placed in the County jail at Dothan on the armed robbery charge.
Q. Did you talk to him at that time?
A. I did.

Q. Did Mr. Lill talk to him?

[fol. 173] A. Yes. sir.

Q. Was there anybody else there?

A. The jailor I believe was around the cell there.

Q. He did not participate in any conversation?

A. No.

Q. Was anybody else there?

A. I don't recall anybody else being there.

Q. Did Mr. Smith make any statement in your presence, in your hearing, regarding the armed robbery of the apartments?

A. Well, we talked to him about that and about an automobile that we suspected he might have been involved in, interstate transportation of a stolen automobile.

Q. Did he make any statement relative to the theft and transportation of that automobile?

A. No. Not that I recall.

Q. Did he make any statement in your presence regarding the armed robbery of the apartments?

A. Not that I recall.

Q. Did he make any statement in your presence regarding the shooting of one Billy Gilbert?

Mr. Moore: We object.

The Court: Overruled.

A. Not that I recall.

Q. Now, we will go back to Geneva, were you present in the men's room in Geneva at the time Johnny Ray Smith came out?

[fol. 174] A. I was not.

Q. When did you first see him in the Osceola Hotel?

A. He was sitting just outside the men's room in the Osceola Hotel when I came in he had been handcuffed and was sitting there in the chair.

Q. Was that in the lobby of the hotel?

A. It was back in the back part there. And he was taken up to a room in the hotel shortly after I came in.

Q. Tell us what then happened?

A. He was taken in and there was some conversation as to whether or not he wanted food and if he felt allright and he asked to be fed. The handcuffs were taken off and he was allowed to go to the bath room and bathe his hands and a hot meal was brought up from the kitchen and he

sat and ate the meal. Several of us talked to him about where the other two boys were, Nunn and Jenks. And he told us he had not seen them since.

Q. That is all right, don't tell what he told you. Were you present when he was talked to regarding the kidnapping case in your presence?

A. I don't recall that anybody asked him any questions directly concerning the kidnapping at that point.

Q. At any time?

A. No. We didn't have any discussion about the kidnapping during the time that I was with him.

Q. In Dothan did you have any discussion about it then?

A. He was arraigned before the United States Commissioner, where the charges were read to him. I was present at that time.

Q. Did anybody in your presence offer him any threats or promises?

[fol. 175] A. No, sir.

Q. At any time?

A. No, sir.

Q. Was any statement there made voluntarily and——

Mr. Moore: We object to that.

Mr. Varner: All right we will leave that out. Did he make a statement relative to the kidnapping of Allen Spearman at that time?

A. Not in my presence.

Q. Were you present for the whole investigation?

A. I was.

Q. The Court: Mr. Varner, what do you expect to prove by this witness?

Mr. Varner: I understood that this man was there when he admitted his participation in the kidnapping case.

The Court: Lets me suggest you do that at a recess, not on the witness stand. You are taking up the Court's time and the reporter is having to take it down. Let's do that at a recess. Ascertain what he is expected to testify to and then put him back on the witness stand.

Mr. Varner: All right.

Q. Did you see him in the jail? At Dothan.

A. I accompanied Detective James Lewis and John Lill

to the County jail with him, where he was delivered to the jailor, and I left.

Q. Did you see him any time after that?

A. I did not see him after that.

Q. Did you see him walking at any time?

A. Yes.

[fol. 176] Q. Did he limp?

A. No, sir.

Q. Was he flushed at all in the face?

A. No, sir.

Q. Was there anything to you that indicated that he might have been sick?

A. No, sir.

Q. Did he talk to you and others in your presence?

A. Yes, sir.

Q. Did he talk in an alert manner or in a sluggish manner?

A. No, sir. He was very rational at all times.

That is all.

Cross-examination.

Mr. Moore:

Q. Did I understand you to say you never saw this man, Mr. Smith, in the Dothan jail after you delivered him there with Mr. Lewis and Mr. Lill?

A. Yes, sir.

Q. How long did he sit out in the lobby before he was carried upstair?

A. I suppose he was there approximately five minutes after I arrived at the hotel. I had been gone from the hotel about fifteen minutes when I got back he had been apprehended and was seated in a chair as I recall at the door of the men's room there, with handcuffs on him and approximately five minutes later he was taken up to a room.

Q. Who took him up?

A. Well, there were about seven FBI Agents and I don't know, I think a couple of deputy sheriffs and the sheriff [fol. 177] and highway patrolmen were all there.

Q. You were not one of the takers, were you?

A. I don't recall that I had my hands on him.

Q. Did you ever see him without his clothes on?

A. No, sir.

Q. In other words, you don't know whether his body was bruised or not?

A. No, sir.

Q. Did he tell you he was bruised and scratched when he left that Panama City jail?

A. The only thing I would recall him saying was that when he went thro- the bars that he scratched his hip, that is the only thing that I recall him saying.

Q. Did you examine that hip?

A. No, sir.

Q. Where did he tell you he had scratched his hip, was that upstairs or where?

A. I think I asked him how he got through that hole in that bulk head and through those bars. And he told me that he put soap on his body and he squeezed through those bars with the help of somebody pushing him or pulling him and that he scratched his hip going through it.

Q. Did he say he fell?

A. I don't remember whether he said he fell, hurt his hip falling or but sometime during the escape period he said that he scratched his hip.

Q. Did he say that he fell out of third story window during the escape?

A. There were two stories, the ground on the outside [fol. 178] slopes down, he didn't tell me he fell out of it of the jail.

Q. How do you know whether that meal was hot or not.

A. It had just been ordered and it was brought up and I believe that I recall that I could see vapor rising from——

Q. Six years ago you remember seeing vapor rising from that food?

A. Yes, sir.

Q. Are you sure of that?

A. Yes, sir.

Q. Did you taste the food?

A. No, sir.

That is all.

The Court: Any re-direct?

Mr. Varner:

Q. Did Smith have or ask for a doctor?
A. No, sir.
Q. Or a lawyer?
A. No, sir.

That is all.

LAWRENCE HORN, being called as a witness, being duly sworn, testified as follows:

Direct examination.

Mr. Varner:

Q. Your name is Lawrence Horn?
A. Yes, sir.
Q. And on November 18, 1949, what were you doing?
[fol. 179] A. I was a deputy-sheriff. Houston County.
Q. Were you also considered as a jailor?
A. Yes, sir. I took the jailor's place on certain days, one day a week.
Q. Then you were not there when Johnny Ray Smith was in jail?
A. Yes, sir. I was there, but not when he was put in jail.
Q. Did he make a request of you for a doctor? At any time?
A. No, sir.
Q. Did he make any request to you for a lawyer?
A. No, sir.
Q. Did you or did you not, see him talking to a lawyer or a doctor?
A. Well, during the time he was there, I would come up in the jail for some purpose or other and he was in there, the best I remember he was talking to Perry Calhoun.
That is all.

Cross-examination.

Mr. Moore:

Q. What period were you on duty while Johnny Ray Smith was in jail?
A. I was just on one day the best I remember.

Q. What day was that?

A. I believe it was on the 19th the day after he was put in jail.

Q. Would that be on Saturday or on Sunday?

A. I don't know.

Q. Where was he jailed?

A. He was upstairs on the south side. He was on the top in the third story.

[fol. 180] Q. Do you have a solitary cell upstairs there?

A. No, sir. There are just two on the side where he was.

Q. Is that counting the basement a story, to have three stories?

A. Yes sir.

Q. Then it is the second story of the jail?

A. That is right.

Q. The first floor doesn't have any cells at all, does it?

A. That is right.

Q. That is the office space not where the prisoners are kept?

A. That is right.

Q. So he was on the second floor of the jail?

A. He was in the third story. It was the second story of the jail, that is right.

Q. The top floor?

A. Yes, sir, that is right.

Q. Was he in solitary?

A. No, sir. There was no one in the cell with him. But there is another cell adjoining that one. And the best I recollect there was another man in there. He was in a cell by himself.

Q. Who was in the cell next to him?

A. I believe it was a fellow, John Earl, the best I can remember.

Q. Is that one of these solid door cells with a little bit of a hole in it?

A. No, it just had bars.

Q. Did you ever have occasion to go back there?

A. Yes, sir.

[fol. 181] Q. Is that a sort of isolated wing it is in?

A. No, sir. It is not isolated.

Q. I am talking about those two cells?

A. Yes, sir.

Q. Did you go back there for the purpose of talking to Johnny Ray Smith?

A. I don't remember whether I went to talk with him but I did talk with him while the janitor was feeding him anyway I talked with him him while he was there.

Q. Did you ever see anybody else talking to him besides Perry Calhoun?

A. I think I saw Mr. Lill and Mr. Lewis, and Mr. Foy, I believe.

Q. Those are all FBI men?

A. Yes, sir. Except Mr. Lewis.

Q. Who is Mr. Foy?

A. He was a U. S. Deputy Marshal I think.

Q. Are those the only people you saw talking to him?

A. That is all that I remember.

Q. Now do you know anything about why Mr. Perry Calhoun was over there?

A. No, sir.

Q. As a matter of fact, yesterday morning, didn't you remember he called you to come over there?

A. No, sir. I didn't call him.

Q. You didn't make that statement standing out there near the Marshal's office?

A. No, sir.

Mr. Davis: We object. He has told who all was present.

[fol. 182] The Court: Overrule that objection.

Mr. Davis: We except.

Q. You may answer?

A. No, sir. I didn't make that statement.

Q. What was the nature of that conversation you were having yesterday morning?

Mr. Varner: We object.

The Court: Sustain it.

Mr. Moore: Did he talk with him (Perry Calhoun) about what he knew about the case?

A. I was talking with him, but he was just asking me something about it.

Q. You took him and led him off to one side of the corridor didn't you?

A. I don't remember that I did.

Q. Go ahead.

A. He was just talking about it, that it was not right clear in his mind about him going up there to talk with him, something like that. I don't remember just what it was he said. He was asking me something about it.

Q. Did you tell him at that time to come over there?

A. No, sir.

Q. You don't know what conversation you did have with him, do you?

A. No, sir. I do not.

That is all.

The Court: All right. Any re-direct?

Mr. Varner: How was Johnny Ray Smith clothed when you saw him in the jail?

A. He just had on his shorts.

[fol. 183] Q. Do you know where his other clothing was?

A. The best I remember they were lying across his bed.

That is all.

W. D. Sanders, called as a witness, being duly sworn, testified as follows:

Direct examination.

Mr. Varner:

Q. You are W. D. Sanders?

A. Yes, sir.

Q. On November the 18th, 1949, what was your business?

A. I was the jailor at the Houston County Jail on the day shift.

Q. Were you the only jailor?

A. No, sir. There were two of us. I had the day shift, and it ran from 6:00 in the morning until 6:00 at night.

Q. Who was the other jailor?

A. Mr. Aleck Gordon.

Q. What was Mr. Lawrence Horn's connection in the jail?

A. Mr. Horn was a deputy, in case of sickness or in case one of the others would be off he would relieve us. And take our place at the time.

Q. Do you know Johnny Ray Smith?

A. Not personally, sir.

Q. Do you recall at any time when he was in jail on November 18, or 19, 1949 in Dothan?

A. Yes, sir.

Q. Did you see and talk to him in person at that time?

[fol. 184] A. Yes.

Q. Did you talk to him at that time?

A. I did talk to him, very little but I did talk to him.

Q. Did he at any time while you and he were there ask you to get him a doctor?

A. No, sir.

Q. Did he ask you to get him a lawyer?

A. No, sir.

Q. Did he ask you to get him clothing?

A. No, sir.

Q. Did he complain to you that he was cold?

A. No, sir.

Q. Was the jail warm or cold?

A. It was warm.

Q. Do you recall how he was clad?

A. I was there at the time he was brought in; I booked him. Of course, me being the jailor, I was in the ante-room there.

Q. At that time, in your best judgment, how was he clothed?

A. To my best recollection I think it was khaki pants, and maybe a khaki shirt, maybe the color might vary, but it was just shirt and trousers.

Q. Do you recall the condition of those clothes, whether they were clean or dirty?

A. Frankly, I don't remember too close, but I know, more or less hearsay.

Q. Don't give that. Do you recall whether or not there [fol. 185] were any blood stains on his clothes?

A. No, I don't.

Q. How long a time did you talk to him to the best of your recollection?

A. Maybe five minutes over all.

Q. Did he answer your questions in an alert manner?

A. Oh, yes.

Q. Did he complain to you that he was sick, or that he was hurt?

A. No, sir.

Q. Was his face flushed and feverish looking?

A. I don't recall.

Your witness.

Cross-examination.

Mr. Moore:

Q. In what cell did you put him, Mr. Sanders?

A. I believe, the best I remember, I didn't confine him to the cell. It was rather late in the afternoon and I went off duty at 6:00 o'clock.

Q. When did you come back on duty?

A. 6:00 next morning.

Q. Did you work during the following day?

A. Yes.

Q. All day long?

A. Yes, I suppose so, I don't believe I missed a day while I was jailor.

Q. Did you work until 6:00 o'clock on Saturday night?

A. Yes.

Q. How about the following day?

[fol. 186] A. Sunday, yes.

Q. Would Mr. Horn be working at the same time you were?

A. No, sir, except there was a variation of time, sometimes Mr. Dorman and I would stay maybe thirty minutes afterwards or he would come early while I was cleaning up in the morning and kind of straighten up the rest of the time while I was upstairs.

Q. Well, in other words, one of the three of you were jailors, as I get the picture?

A. I didn't understand the question.

Q. Well you said you had a day jailor and a night jailor and a pinch-hitter.

A. Yes, sir.

Q. And you only had one at a time, and if two of you happened to be there, it was an overlap of your schedule getting ready for the next day?

A. Yes, sir.

Q. Where was Johnny Ray Smith when you came back on duty next day?

A. From the front of the Houston County Jail he was on the right hand side on the back part, on the south-east side.

Q. Were there just a couple of cells back there?

A. Yes, sir.

Q. Was he in a cell by himself?

A. I believe so.

Q. Who was in the other cell?

A. I wouldn't say for certain.

Q. To refresh your recollection was it a man named John Earl?

A. I believe that is right.

[fol. 187] Q. Are these two cells more or less isolated from the rest of the jail?

A. Yes, sir.

No further questions.

A. W. Dorman, called as a witness, being duly sworn, testified as follows:

Direct examination.

Mr. Varner:

Q. You are Mr. Alex W. Dorman?

A. Yes, sir.

Q. On November 18, or thereabouts, in 1949, jailor in Dothan, Alabama, were you not?

A. Yes, sir.

Q. You were present when they brought Johnny Ray Smith in the jail, on or about November 19, 1949 were you?

A. I was jailor at night. I was not there when he was brought in.

Q. Well, I believe you were there when he was there, is that correct?

A. Yes, sir.

Q. Would you know Johnny Ray Smith if you were to see him now?

A. The men are in and out that way, but to my best judgment that is him over there.

Q. You do recall when he was in Dothan in jail?

A. Yes, sir.

Q. Did you talk to him at any time when he was in jail?

A. Well it has been quite a while, and I can't remember. I was jailor at night, during the night I would go up you [fol. 188] know and check around, and it seems to me like I did, that I did talk to him, asked him how he was or something like that; which I did to all of them if they were awake.

Q. You were available, you were within the hearing of Johnny Ray Smith, he could have called you?

A. Yes. He could have called me.

Q. He could see you, where you were?

A. No, sir.

Q. Now, do you recall any conversation that you had with him?

A. No, sir. I do not.

Q. Did he at any time ask you for a doctor?

A. Well, to my best recollection he did ask about a doctor.

Q. What, how did he ask for a doctor?

A. To my best recollection he asked could I get him a doctor. I asked him, I said, well, if you need a doctor. I said, I will see about getting you a doctor. To my best recollection I did, I called Dr. McFadders that night.

Q. To your best recollection did he come?

A. No, sir. He didn't come. It was a hard matter to get a doctor at night that way. And Dr. McFadders was the only doctor because he did make his rounds at night at the hospital and see his other patients. I do remember that I called for another doctor for him, but I was not able to get a doctor.

Q. Did Johnny Ray Smith tell you what was the matter with him, and why he wanted a doctor?

A. Well, to my best recollection he did tell me that he was suffering with his back or hip of something. I didn't ask [fol. 189] him, I said what seems to be your trouble, that you want a doctor. And he said his back or his hip or something concerning his back or hip.

Q. On how many occasions did you talk to him about his sore back or hip?

A. That was the only time.

Q. Do you remember when that was?

A. To my best recollection it was either on Saturday night or Sunday night.

Q. Do you recall how he was dressed? At the time?

A. No, sir. I do not.

Q. Do you recall whether or not he showed you anything on him that would indicate that his back was injured.

A. No, only my best recollection he did put his hand on his hip or his back. And he said he was suffering from that. And I figured he did need a doctor and I always get them a doctor if I could.

Q. Did he later ask you about the doctor again?

A. I do remember that I told him I was not able to get hold of a doctor.

Q. Did he say he still needed a doctor?

A. He didn't say anything about that. I told him I had not been able to get in touch with him a doctor.

Q. Had he previously asked for a doctor?

A. No, sir. Not that I know of.

Q. Did he ask you for a lawyer?

A. No, sir.

Q. Did he ask you to let him make a phone call? To ask for a lawyer?

A. No, he did not.

[fol. 190] Q. Was he alert in asking you these things and asking these questions?

Mr. Moore: We object.

The Court: I sustain that objection.

Mr. Varner: That is all, your witness.

Mr. Moore: We have no further questions.

James W. Daughtry, called as a witness, being duly sworn, testified as follows:

Direct examination.

Mr. Varner:

Q. State your name?

A. James W. Daughtry.

Q. And your business?

A. I am Deputy Clerk, United States Commissioner, Southern Division, Dothan, Alabama.

Q. Were you such on November 18, 1949?

A. Yes, sir.

Q. Do you know Johnny Ray Smith?

A. Yes.

Q. Woud you know him if you were to see him in this court room?

A. Yes, sir.

Q. Point him out to me?

A. There he is. (Pointing.)

Q. Did you have a conversation with him on November 18, 1949?

A. I did.

Q. Where did this conversation take place?

[fol. 191] A. In the clerk's office.

Q. Who was present?

A. I don't remember who was present now.

Q. Do you remember any one who was present?

A. I think Benton Foy was present, he is deputy marshal. He was present.

Q. Was Johnny Ray Smith present?

A. Yes, he was present.

Q. Do you remember anybody else?

A. Well, there were two other defendants, in the case, who were present.

Q. They were all three there?

A. Yes, all three of them.

Q. At that time did anybody make any threats or promises to Johnny Ray Smith in your presence?

A. No, they did not. Not in my presence, they didn't.

Q. Did Johnny Ray Smith make a statement to you relative to the kidnapping?

A. Well, I got them in there and arraigned them and told them what they were charged with. I told them they had the right to get an attorney to advise them if they wanted to.

Q. What did you tell them they were charged with?

A. I told them they were charged with kidnapping Alen Spearman, and violation of Title 18, Section 1201.

Q. Did Johnny Ray Smith make any statement to you?

A. He did not. I told him any statement he might make might be used against him.

[fol. 192] Q. How long did you talk with them?

A. Not very long.

Q. Did he answer your questions?

A. He didn't have much questions to answer.

Q. He didn't answer the question?

A. All he said, I told him we would give him a lawyer to advise him, he said he didn't want a lawyer.

Q. Was that answer promptly given?

A. Right off the bat.

Q. No hesitation?

A. No hesitation.

Q. Did he ask you any questions?

A. No, *He* didn't ask me any questions, and I told him, I asked him what he wanted to do, I told him he could wait for a grand jury, for action of a grand jury, mean while we will have a hearing, get the witnesses here. And he said he didn't want to have no grand jury he said that he pleaded guilty to the charge.

Q. He made that statement?

A. Yes. He did.

Q. That was Johnny Ray Smith?

A. That is right.

Q. Did you have occasion to observe the way he walked, at that time?

A. I did not see any difference to his walk and anybody else.

Q. You didn't notice a limp?

A. No, sir.

[fol. 193] Q. Did he make any complaint to you about his physical condition?

A. He did not.

Q. Did he complain to anybody that he had been denied the right to see a lawyer?

A. He did not say anything like that.

Q. Did you tell him that he could have a lawyer if he wanted one?

A. Yes. I told him he could have a lawyer to advise him, that I couldn't appoint one for him but he could have one if he had the money to pay him. And that I would give him time to get one.

Q. How was he dressed at that time?

A. He wasn't dressed very much. I couldn't tell you exactly but he just had on common clothes. It strikes me

that his pants were lighter than his coat. That is my remembrance, you know it has been five or six years ago.

That is all.

The Court: Cross examination.

Mr. Moore: No questions.

William Arant, being called as a witness, being duly sworn, testified as follows:

Direct examination.

Mr. Varner:

Q. You are Mr. William Arant?

A. Yes, sir.

Q. Were you sworn?

A. Yes, sir.

Q. Now, on or about November 21, 1949, what were you doing for a living?

[fol. 194] A. I was with the police department.

Q. Of what city?

A. Montgomery, Alabama.

Q. Do you know Johnny Ray Smith?

A. I didn't know him but I saw him.

Q. Were you associated with him in some capacity on November 21, 1949?

A. Yes, sir. I helped carry him to the Atlanta prison. I went with the Deputy Warden.

Q. What Deputy Warden did you go with?

A. I think it was Mr. Benton Troy or something like that.

Q. Was anybody with you and Johnny Ray Smith and Mr. Benton Troy, on your trip to Atlanta?

A. No, sir.

Q. To refresh your recollection could it have been Mr. Benton Foy?

A. I think it was that, yes.

Q. Now, what time did you leave Montgomery, do you remember?

A. About 6:00 o'clock in the morning.

Q. What time did you get to Atlanta, do you remember that?

A. I think it was something like eleven o'clock.

Q. Did you go directly to the Federal Penitentiary?

A. Yes, sir.

Q. On that trip did you talk to Johnny Ray Smith?

A. Oh, yes.

Q. Did he complain to you about his physical condition on that date?

[fol. 195] A. No sir.

Q. Did he complain to you about being tired?

A. I don't remember that he did.

Q. Do you recall that he complained to you about being hurt in any way?

A. I don't remember that he did.

Q. Did he complain to you that he was sick?

A. No, sir.

Q. Was his face flushed or feverish?

Mr. Moore: I object.

The Court: I sustain that objection. You can ask how it appeared to him.

Mr. Varner: Did his face appear to be flushed, to you?

A. To my best recollection it did not.

Q. Now, did he appear in the answers he gave in his conversation with you, did he appear to be normal to you?

A. Very normal, yes, sir.

Q. Was there anything that happened that indicated to you that he might not be in possession of his mental faculties?

A. No, sir. Not that I remember.

Your witness.

Cross-Examination.

Mr. Moore:

Q. You say it took you about five hours to go over to Atlanta?

A. Thereabouts.

Q. Where did you stop while en route, do you remember that?

A. I think we made about two stops.

[fol. 196] Q. What was the nature of the conversation you had while you were riding along, what were you talking about?

A. I remember that he talked very freely, it seemed like he had been in the termite business. He talked very freely about the termite business; it seemed like he had been associated with someone who was in that business and he worked for him.

Q. Did you ever ask him if he was sick or injured?

A. No.

Q. Did you ask him, did you examine his body?

A. No, sir.

Q. Did you put him to bed when you got to Atlanta?

A. Yes, sir.

That is all.

JACK JOHNSON, called as a witness, being duly sworn, testified as follows:

Direct examination.

Mr. Varner:

Q. Your name is Jack Johnson?

A. Yes, sir.

Q. You are a Deputy Marshal here in Montgomery?

A. Yes, sir.

Q. You were such on November 21, 1949?

A. That is right.

Q. Do you know Johnny Ray Smith?

A. Yes, sir.

[fol. 197] Q. Were you present when a conversation took place between Johnny Ray Smith and Mr. Hartwell Davis in Mr. Davis' office?

A. Yes, sir.

Q. At that time what was Mr. Davis' capacity?

A. He was prosecuting attorney.

Q. Do you recall who was in the room?

A. Mr. Lisenby and Mr. Lill, I don't recall any one else.

Q. State whether or not, to refesh your recollection I show you here a statement purporting to be signed by Jack Johnson, Deputy U.S. Marshal on November 21, 1949, do you remember that?

A. Yes, sir. I do remember that.

Q. The statement purports to state "Hartwell Davis talked to Johnny Ray Smith, Richard Dale Nunn, and Robert Peter Jenks, and offered them no threats or promises," And it is purported to be signed by John W. Lill, Jr. Jack F. Johnson, Arthur Mason and James R. Lewis. Were those people present at that time, and place?

A. Yes, sir. We all signed together.

Q. Is that statement true?

A. Yes, sir.

Q. State what Mr. Davis said to Johnny Ray Smith, to your best recollection?

A. To my best recollection, I couldn't state it word for word, but I can give you more or less general——

Q. That is what we want.

A. It happened when we went into the United States [fol. 198] Attorney's office. He always explained to them.

Mr. Moore: I object.

The Court: I sustain that objection.

Mr. Varner: Did he on this occasion explain to them.

A. I couldn't, it has been some time ago I could only state in general.

Q. Can you state that every time you were in there he explained their rights to them?

Mr. Moore: We object.

The Court: I sustain the objection.

Mr. Varner: Well did he in your presence tell them they had a right to a lawyer?

A. Yes, sir.

Q. Did Johnny Ray Smith ask for a lawyer at that time?

A. No, sir.

Q. Did he tell him he had a right to be tried in Dothan?

Mr. Moore: We object.

The Court: Sustain the objection.

Q. Did Smith ask to be tried in Dothan in your presence?

A. No, sir.

Q. Did Smith ask for a lawyer in your presence?

A. No, sir.

Q. Did he ask to be indicted by a grand jury in your presence?

A. No, sir.

Q. Did he state that he complained about being sick or injured in your presence?

[fol. 199] A. No, sir,

Q. Did he appear to be alert, in possession of all his mental faculties? At the time you were with him in Mr. Davis's office?

Mr. Moore: We object.

The Court: Sustain that. You asked him if he appeared to be in possession of *all* of them. You haven't ascertained whether he had all of them or not.

Mr. Varner: He appeared to be alert in Mr. Davis' office?

A. Yes, sir as far as I could tell.

Q. Were you also in the court room subsequent to that, when Mr. Smith was brought in.

A. Yes, sir, at the time he was sentenced.

Q. Did he appear to be alert at that time?

A. Yes, sir.

Your witness.

Cross-examination.

Mr. Moore:

Q. Mr. Johnson, is this whole thing hazy in your recollection?

A. Parts of it.

Q. Do you remember signing that statement?

A. Yes, sir. I remember signing it.

Q. What time did you sign it. When he first came in there or were they in jail?

A. They were in Mr. Davis' office at the time I signed it.

Q. Is that the time when they were all in there?

[fol. 200] A. Yes, sir.

That is all.

The Court: We will recess until 1:30 P.M.

(After lunch the following transactions took place.)

Mr. Moore: At this time I am willing for the following witnesses to be excused. They are the following: Tullis Easterling, FBI Agent; Mr. Crongeyer, FBI Agent; Bill Gilbert, and Alan Spearman.

The Court: Those witneses will be excused. Call your next witness.

BARNEY LISENBY, called as a witness, being duly sworn, testified as follows:

Direct examination.

Mr. Varner:

Q. State your name?
A. B. H. Lisenby.
Q. You were the Court Crier for Judge Kennamer?
A. Yes, sir.
Q. You were such on November of 1949?
A. That is right.
Q. Did you have an occasion to see Johnny Ray Smith on or about November 21, 1949?
A. Yes, sir.
Q. Where did you see him?
A. I saw him in the District Attorney's office.
Q. Did you see him anywhere else?
A. Yes, I think I came up here with him.
[fol. 201] Q. Did you see him in court?
A. I saw him here in court, yes, sir.
Q. Were you in the U. S. Attotrney's office when Mr. Hartwell Davis talked to Johnny Ray Smith?
A. I was there part of the time, I heard some of the conversation that they carried on in there.
Q. Will you state to the Court what you heard?
A. Mr. Davis asked him if he wanted a lawyer and he said, "No." And Mr. Davis told him it was a sort of serious offense and I recollect that Mr. Davis read the Code to him, that he could be from nothing to life.

Mr. Varner: He said it could be from nothing to life?

A. Yes, sir. He said a serious case like that he would like for him to have a lawyer, and Johnny Ray Smith said he didn't want one.
Q. Who was in the office when you were in there?
A. I just don't remember who was in there, there were several in there.
Q. Were all three of the defendants in there.

A. Yes, all three of the defendants were in there.

Q. That was Smith, Nunn and Jenks?

A. That is right. I usually went in the office when they were asking those questions.

Q. Did you hear Mr. Davis tell Johnny Ray Smith he would receive any definite sentence?

A. No, sir. I sure didn't. Mr. Davis told him he didn't know what the Judge would do. He said the Judge never tells anybody what he will do until they plead guilty.

[fol. 202] Q. Did you hear him discussing whether or not he could have a lawyer while he was in Mr. Davis' office?

A. Yes, he told him he could have a lawyer, if he wanted one, he would get him one.

Q. What did Johnny Ray Smith say to him then?

A. He said he didn't want a lawyer, that he was guilty and was going to plead guilty.

Q. Did Johnny Ray Smith appear to be alert, and intelligent at that time?

A. He appeared to me he was all right. As far as I could see.

Q. Did you see him in court?

A. Yes, sir.

Q. Did he appear to be alert and intelligent while in court?

A. He seemed to be, yes, sir.

Q. Did you notice anything that appeared to you to indicate any physical defect in Johnny Ray Smith?

A. No, sir, I did not.

Your witness.

Cross-examination.

Mr. Moore:

Q. Did you ever examine Johnny Ray Smith?

A. No, sir. Nothing more than just to look at him. I never did examine him.

Q. Did you ever hear Hartwell Davis or the Judge either one tell these prisoners what defenses they might possibly have?

[fol. 203] A. No more than to tell them they could have a lawyer, Judge Kennamer told him the same thing here

in court, and Mr. Davis told him if he was aboe to hire a lawyer it was his duty to hire his own lawyer.

Mr. Varner: Excuse me, you have told us that. My thought is, that that is not a relevant part of the issue in this case, as it stands, and if Mr. Moore wants to amend his case to include that, then we would have no objections. We don't feel that is material on the pleadings as they stand now. Mr. Moore may think he can raise it on another case, and we want to avoid that proposition. We rule to exclude the answer to that question.

The Court: The objection is overruled.

Mr. Moore: Mr. Lisenby, I ask you if at any time you ever heard Mr. Davis, or the Judge either one, tell Johnny Ray Smith what his defenses were to the crime charged against him?

A. He told him now you don't have to plead guilty. If you want to you can waive action and go to the grand jury and have a jury trial. And he said he didn't want to do that. He said well you are entitled to a lawyer, and if you are not able——

Q. I will repeat the question again. Did either one of them specifically tell any of these defendants what the defendant's defenses were to the charges against them?

Mr. Davis: We object.

The Court: Overruled.

Mr. Lisenby: I don't know what you are talking about.

Mr. Moore: Did they discuss with the defendants what [fol. 204] possible defenses they might have to the charges against them?

A. I don't remember any except they told them they could have a lawyer if they wanted one.

Q. Did either the Judge or Mr. Davis discuss the charges in detail and explain the significance of the legal angle of the language of 1201 to either one of them?

A. Mr. Davis told them it carried from nothing to life and he read the statute to them.

Q. Did he explain it to them?

A. Yes, sir. He told them what it meant.

Q. What did he tell them?

A. He told them they could turn him loose or give him life.

Q. That would be if they convicted him. Did he explain to them the statutes?

A. I don't exactly understand what you mean.

Q. I will ask you like this: You say he read the law to them, what they were charged with?

A. He read the law what count it was for it.

Q. Did he discuss that feature along with them, did he at any time tell them what that particular law meant. Did he tell them what inveigle meant? Did he discuss what legal requirements were necessary to make out a case against them?

Mr. Davis: We object.

The Court: Overruled.

A. About the only thing the Judge done, when they came [fol. 205] in here to plead guilty he explained to them they could have a lawyer, and he doesn't tell them what the penalty will be. He never tells them until the plead guilty.

Q. I am talking about did the Judge or Mr. Davis, either one, explain the technical legal language of the charge to them.

Mr. Davis: We object.

The Court: Overruled.

A. Yes, they explained that they were charged with kidnapping and what it carried. Mr. Davis did, Judge Kennamer didn't.

Q. Did he tell him what his defense was?

A. He did not tell him any defenses he could have except he could have a lawyer to defend him, that is all that I know.

Q. That is the only conversation you remember hearing between them that day is that right?

A. That is all. They did not explain what action they could take to defend themselves, or anything like that. They didn't try to defend them.

The Court: Any redirect?

Mr. Varner: Did any one in court in your presence ask Johnny Ray Smith, and Nunn and Jenks, whether they understood the charge or not?

A. Yes, sir. Judge Kennamer did.

That is all.

The Court: Next witness.

JOHN LILL, being called as a witness, being duly sworn, testified as follows:

Direct examination.

Mr. Varner:

[fol. 206] Q. You are John Lill?

A. That is right.

Q. You are an agent for the FBI and you were such on November 14, to November 21, 1949, at Dothan, stationed at Dothan?

A. Yes sir.

Q. And in July of 1949?

A. Yes, sir.

Q. All during that month?

A. Yes, sir.

Q. And you have been ever since?

A. Yes, sir.

Q. Do you know Johnny Ray Smith?

A. Yes, sir.

Q. Do you see Johnny Ray Smith in the court room?

A. I do. He is the man with the glasses on over there.

Q. Now, we would first of all like to have these pictures marked for identification.

Mr. Moore: We object. We think the best identification is the man himself.

The Court: Overruled.

Mr. Varner: Now, will you look at this picture. Do you know when that picture was taken?

A. That picture was taken on the night of July 13, 1949, at the Dothan Police Department.

Q. And that Picture is marked Exhibit 5, for the gov-[fol. 207] ernment, is it not for identification?

A. Yes, sir.

Q. Do you know the man in that picture?

A. Yes, sir.

Q. Who is he?

A. Johnny Ray Smith.

Q. I offer these in evidence.

The Court: Taken on July 13?

Mr. Varner: The purpose, your Honor, is to show how he looked prior to the arrest that happened from the kidnapping and compare that picture to pictures taken of him after the kidnapping.

Mr. Moore: We have no objection to the introduction of those photographs.

Mr. Varner: The last was marked Exhibit no. 10, This will be no. 11, for the government.

The Court: Have you offered any of them Mr. Varner?

A. I have offered five, but I withdraw that offer and identify them all and offer them all at one time to simplify matters.

Mr. Varner: Will you tell when that picture was made?

A. This picture was made at the Commissioner's hearing, held in the Post Office Building at Dothan on November 18, 1949.

Q. And will you look at this picture. Marked Exhibit 7 for the Government. State when that picture was taken?

A. Exhibit 7 is of Johnny Ray Smith, and it was taken at the same time as Exhibit 6 was taken, on November 18, 1949, in the Post Office Building.

[fol. 208] Q. Look at Exhibit 8 for the government. Will you tell when and where it was taken?

A. Exhibit 8 was taken while Johnny Ray Smith was being taken from the Post Office Building in Dothan to the Houston County Jail.

Q. Who are those. Do you recognize those people?

A. I do.

Q. Who are they?

A. The person on the left is James R. Lewis, at that time he was a detective with the Dothan Police Department. Then Johnny Ray Smith, and Tullis Easterling and at the extreme right is Benton Foy, Deputy U.S. Marshall, at that time.

Q. I will show you Exhibit 9. Do you recognize these people?

A. I do.

Q. Who are they from left to right?

A. Tullis Easterling, Johnny Ray Smith, and I am in the background and James R. Lewis is on the right.

Q. I will show you Exhibit 10.

A. That is the same as Exhibit 9. It is an enlargement of Exhibit 9.

Q. And I show you Exhibit 11.

A. Exhibit 11 is a photograph of Johnny Ray Smith, front and side—side view of Johnny Ray Smith.

Q. Does that purport to be a picture taken at the Sheriff's office at Panama City, Florida, on August 2, 1949?

A. Yes, sir. And that date is shown on the photograph.

Q. I offer these photographs in evidence, your Honor.

[fol. 209] The Court: You offer Exhibits 5 through 11—they will be admitted.

Mr. Varner: Mr. Lill, how long have you known Johnny Ray Smith?

A. I have known Johnny Ray Smith since July 13, 1949.

Q. Tell the Court the entire circumstances under which you first met Johnny Ray Smith?

Mr. Moore: I object.

The Court: I sustain that.

Mr. Varner: Did you participate in an investigation of a kidnapping case against Johnny Ray Smith on or about November 18, 1949?

A. I did.

Q. Did you see Johnny Ray Smith on that day?

A. Yes, sir.

Q. Where did you first see him?

A. I first saw Johnny Ray Smith around 12:45 P.M. on November 18, 1949 seated in a chair next to the men's rest room in the lobby of the Osceola Hotel in Geneva, Alabama.

Q. Who was with him?

A. James R. Lewis, Jack Morris, Deputy Sheriff, at that time in Geneva County; and Robert Crongeyer, Special Agent with the FBI; and Homer Dunlap, Special Agent FBI; and I am not positive as to the identity of others who might have been there, at that time.

Q. What did you do then?

A. Johnny Ray Smith was, at the time I first saw him he was seated in a chair and was handcuffed, he was asked the whereabouts of the two boys that had been with him on a kidnap matter.

[fol. 210] Q. Where did you go after you left the lobby?

A. We went to room 11 on the second floor of the Geneva Hotel.

Q. Did Johnny Ray Smith go up there?

A. Yes, we took him to that room.

Q. How long did you stay up there?

A. We stayed up there from around 1:00 o'clock until about 1:25, approximately.

Q. What did Johnny Ray Smith do while you were up there?

A. Well we removed the handcuffs and allowed him to wash up in the lavatory in the corner of the room, and a meal was ordered for him and it was brought up to him and he ate the meal and a second cup of coffee.

Q. Did you or did you not discuss the kidnapping case?

A. No, he was not questioned as to the kidnapping. There may have been comments about the kidnapping case from him, but not in answer to any questions.

Q. Do you recall any comments that he made?

A. Well, he asked about Alan Spearman, how he was, I am not positive that that question was asked by him at that time. It might have been while we were en route to Dothan later on. But, I do recall that we had some conversation with Detective Lewis and in a jovial mood asked Lewis if he could see his gun. And Lewis was on the opposite side of the room.

Q. Now, when, if at all, did you first discuss the kidnapping case?

A. That was the following day I discussed that with him.

Q. Where were you then?

A. At the Houston County Jail, at Dothan, Alabama.

[fol. 211] Q. When did you have the Commissioner's hearing?

A. As soon as we arrived in Dothan, on the afternoon of the 18th. We went directly from Geneva to Dothan. I took Johnny Ray Smith over in the car and I was ac-

companied by Detective Lewis and Special Agent Easterling. They rode in the back seat and I drove the car.

Q. When you first saw Johnny Ray Smith, was he dressed as he is in Exhibit 10?

Mr. Moore: We object to that.

The Court: Overrule that.

A. Yes, sir. That photograph was taken as we were leaving the hotel.

Mr. Moore: We object.

The Court: Overrule that objection.

Mr. Varner: Was he dressed as he was dressed in Exhibit 8?

A. Yes, sir.

Q. Do you see anything in those pictures that might be blood stains on those clothes?

A. No, sir.

Q. Did you, on the occasion of his association with you, during that period of time you have testified to, see anything on his clothes that indicated, or did you see any blood stains on his clothes?

A. No, sir. I saw none.

Q. Did you see any at any time from the 18th through the 21st?

A. No, sir.

Q. Now, you testified the first time you interviewed Johnny Ray Smith directly, concerning the kidnapping case, was when?

[fol. 212] A. November 19, 1949.

Q. About what time?

A. I interviewed him, started at 1:26 P.M.

Q. Exactly?

A. I have an interview log which shows how long the interview lasted.

Q. And how long did it last?

A. Until 2:15, that interview was until 2:15.

Q. Now, did Johnny Ray Smith at that time make any statement, relative to his guilt or innocence in the kidnapping?

A. Yes, he did.

Q. Did anybody in your presence make any threats or promises to him?

A. No, sir.

Q. What did he say?

A. At the outset of the interview I told him that he didn't have to make any statement, and he was entitled to counsel; and he said he understood that very well. And I asked him about the kidnapping matter. He said he didn't mind telling about it, but he wasn't going to give me any written statement on it, and we talked a few minutes about the matter and he told how they left the jail and that they ran through the woods, and how they got the shotgun at the house near Blountstown, Florida, and stopped the car driven by Alan Spearman near Blountstown, and in relating how they came up on the car Smith said that he told Spearman that he was not going to harm him but for him not to try to prevent them from going on up. And he mentioned about them staying out in the woods down there, near Samson.

[fol 213] Q. All right, did he tell you how he got up into Alabama?

A. Yes, he said they came into Alabama in Alan Spearman's car.

Q. Was Alan Spearman with him?

A. Yes, sir.

Q. Did he tell you when he let Alan Spearman go?

A. Yes, he said when he let Alan Spearman go he told him his car would be not far off. I think that he mentioned that it would be a mile or two down the road.

Q. Now, during your questioning of Johnny Ray Smith, did he ever at any time tell you that he was not going to plead guilty?

A. No, sir.

Q. Did you at any time show him the picture of some wanted person or tell him if he could help you locate that person that you could make a deal for him and do business with him?

A. No, sir.

Mr. Moore: Now we object to the question in that form, your Honor.

The Court: Overrule that objection.

Mr. Varner: Did you ever ask Johnny Ray Smith to go to Court and plead guilty?

A. No, sir.

Q. Did you ever tell him that he would be foolish to stand trial?

A. No, sir. I did not.

Q. Did you ever tell him that he didn't have a chance?

A. No, sir.

Q. Did you ever tell him that if he stood trial he would [fol 214] probably have the death penalty?

A. No, sir. I did not.

Q. Did you ever promise him that if he plead guilty that you would see that he got only a nominal sentence?

A. He was not given any promises whatsoever.

Q. Did you ever tell him that he would not get more than ten years?

A. No, sir.

Q. Did you ever tell him that you would try to get the Judge or anybody to set his sentence up so it would run concurrently with his Florida sentence?

A. No, sir.

Q. Did you ever tell Johnny Ray Smith that his co-defendants were planning to plead guilty.

A. No, sir.

Q. Did he ever tell you that he wanted a Doctor?

A. No, sir.

Q. Did he ever complain to you about his injuries?

A. He did not complain about any injuries.

Q. Did he ever tell you that he had any injuries?

A. He mentioned, I believe he said he scraped his hip as he escaped from the jail.

Q. Did you look at his injury?

A. No, sir.

Q. Did you talk to him about it?

A. I asked him if he needed a Doctor and he said, "No. I feel alright now."

Q. Was that the only time he mentioned it?

A. That is right.

[fol. 215] Q. Did you tell him that as far as you were concerned he could lay down and die?

A. No, sir.

Q. Did he ever ask you for a lawyer?

A. No, sir.

Q. Did you ever tell him that it would be to his advantage, after the question that the Judge would ask him about a lawyer and venue and about his rights to indictment, to the effect that he didn't want any of them?

Mr. Moore: We object.

The Court: Sustain that objection.

Mr. Varner: Well, I will reword that. Did you tell him then that the Judge would ask him about his rights to a lawyer.

The Court: Ask him about the substance and the effect or anything as you go along, Mr. Varner, I would like to know that, too.

Mr. Varner: Did you tell him in substance that Judge would inform him that he had a right to a lawyer?

A. I believe I did. I believe I told him of all of his rights.

Q. Did you tell him that Judge would inform him of his right to venue, in substance?

A. That is right. I don't know whether I specified that the Judge would inform him but I mentioned that The Court including the officer, the U. S. Attorney and the Judge, would inform him.

Q. And did you inform him as to his rights to a grand jury, his being indicted by a grand jury?

A. That was mentioned to him at the Commissioner's [fol. 216] hearing, whether I repeated it to him or not, I am not positive.

Q. Did you ever tell him that the Judge would ask him about these rights and that it would be to his advantage to answer the question to the effect that he did want to exercise his rights?

A. I certainly did not.

Q. Did you ever tell him that he could not go around the country shooting officers of the law and expect to get away with it?

A. No, I didn't say that.

Q. Did he ever ask you to let him use the phone to call an Attorney? During the time between November 19th through the 21st November?

A. If he asked me to use the phone, he was allowed the privilege of doing it. I don't recall.

Mr. Moore: We object, and move to exclude that.

The Court: Motion granted, and that will be excluded as not responsive.

Mr. Varner: Did he ask you, do you recall that he asked you to let him use the phone at all?

A. I don't recall that he did.

Q. Did you make him any promises or any threats any time between November 19th up until the time he came in the court room to plead guilty?

A. No, sir. I did not.

Q. Did anybody in your presence or to your knowledge do so?

A. No, sir.

Q. Were you in the court room when he came in to plead guilty?

A. Yes, sir, I was.

Q. Did you hear him in court, and his questions and answers to The Court?

[fol. 217] A. I did.

Q. Did he appear to be completely in possession of his faculties at that time?

A. He did.

Mr. Moore: We object.

The Court: Overrule that.

Mr. Varner: Did he make prompt answers to the questions addressed to him by The Court?

A. Yes, sir.

Q. Did he appear to make intelligent answers to The Court?

Mr. Moore: I object, that calls for a conclusion.

The Court: I sustain that objection.

Mr. Varner: Was there anything about him that indicated to you that he was physically disabled?

A. There was not a thing about him at any time to put me on notice that he needed medical attention.

Q. After you got him to the jail, did you have him take his clothes off and his underwear off?

A. Yes, sir. He was stripped searched at the jail.

Q. How long did it take?

A. I would say ten or fifteen minutes.

Q. What did you do, to strip search him?

A. We asked him to remove his clothes and hand them to us, and as he handed them to us we searched his clothes for any items of self destruction or escape. And as each item of clothing was searched it was handed back to him [fol. 218] to put back on.

Q. State whether or not you looked the prisoner over to see whether or not there was any item of weapon on him?

A. Not except to scan him.

Q. Did you take all of his clothes off, so that he was strictly nude for a moment?

A. My recollection is that he had his shorts on and that he wasn't asked to remove his shorts.

Q. While he was there in just his shorts, did you see any physical defect whatsoever?

A. I did not.

Q. Did he call to your attention any physical defects?

A. No, sir. He did not.

Q. Did you see any bruise, or scratch or cut of any sort?

A. I did not see any that put me on notice that he was in need of medical attention.

Mr. Moore: We object to that as not responsive.

The Court: I sustain that, that answer will be excluded.

Mr. Varner: Well, did you see any at all?

A. I don't recall that I did. Except some scratches on his arms and legs. He had some, what appeared to be briar scratches on the back of his hands and arms, then on the lower part of his legs were some scratches, there.

Q. Would you call them scratches and not deep cuts?

A. No, they were definitely not cuts. They were not cuts at all.

Q. Did you discuss with Johnny Ray Smith his participation in an armed robbery or burglary case in Panama [fol. 219] City, Florida?

A. Yes, sir.

Q. Did anybody offer him any threats or promises in your hearing, or in your presence, at that time?

A. No, sir.

Q. Were his statements voluntarily made?

A. They were.

Q. What was his statement?

The Court: The Court would like to know when?

A. We talked about that some on the 19th of November, on Saturday.

Q. Who was there?

A. James Lewis, Detective of the Dothan Police Department and myself. And we went in more detail with him on it on the following day, on the 20th.

Q. Now, will you tell us what he said?

A. He told us first—Well leading into that he mentioned——

Mr. Moore: We object as not being responsive to the question.

The Court: I sustain that.

Mr. Varner: What did he tell you?

A. He told us that Buck Smith came to him at Dothan, I believe it was on July 9th, and that he went with Buck Smith to Geneva, where they contacted James Neal Snooks Driver.

Mr. Moore: I object.

The Court: I sustain that.

Mr. Moore: We move to exclude that as not responsive.

The Court: Motion will be granted.

[fol. 220] Mr. Varner: All right. Begin with their preparations and tell what he said about their preparations and the whole trip, their plans and preparation concerning the armed robbery of the Edgewater Beach Apartments.

Mr. Moore: We object.

The Court: I sustain that objection.

Mr. Varner: All right. Did he admit stealing a car at Geneva, Alabama, at that time? He and Snooks Driver—Your Honor, he has denied that.

Mr. Moore: He hasn't got it down to when, I object.

The Court: I sustain that objection.

Mr. Varner: We are talking about an occasion, we have already qualified it as happening on July 10, 1949, is that right, Mr. Lill?

A. That is right. On the night of July 9th, 1949.

Q. On the night of July 9th, 1949, did he tell you that he and Buck Smith and Snooks Driver stole a car in Geneva

at that time and transported it to Panama City, Florida. Did he or did he not tell you that?

A. Yes, sir. He did.

Q. Did he or did he not tell you that in Panama City that they went in and burglarized or armed robbed as they called it, the Edgewater Beach Apartments, is that a hotel?

Mr. Moore: We object.

The Court: I overrule that objection so far. Read the question, please mam.

(Reporter reads the question.)

The Court: I sustain the objection.

Mr. Varner: I will withdraw the question. And rephrase it.

[fol. 221] Q. First of all the name of the place is the Edgewater Beach Apartments, is that correct?

Mr. Moore: We object.

The Court: I understand that certain predicates were laid for this testimony, on a cross examination of the Movant, Johnny Ray Smith, if you will phrase your question so they will tend to possibly shed any light on that information, by virtue of the predicate you laid, I will permit them, otherwise they are not admissible.

Mr. Varner: Now, did he or did he not tell you that they proceeded in that stolen car to the Edgewater Beach Apartments and burglarized these apartments?

A. Mr. Moore: We still object.

The Court: Overrule.

A. He said that they robbed two employees at that apartment.

Q. Well, tell in substance, exactly what he did do.

A. He said that they proceeded in the Plymouth automobile, stolen at the Cotton Mill in Geneva, to the Beach at Panama City, and there they waited a few minutes until the people who were standing around there had left.

Mr. Moore: We object to this line of questioning. There is nothing in the petition of a robbery at the Edgewater Beach Hotel.

Mr. Davis: If your Honor please. There is something in

here about what Mr. Lill told Judge Kennamer about him turning the lights on him. It is all in the transcript from San Francisco District Court and it is all admitted in evidence in this case. It is to make clear to the Court, if pos-[fol. 222] sible, what transpired in regard to those things in the case and we think it is highly competent.

The Court: Are you objecting to it, Mr. Moore?

Mr. Moore: This witness has not adequately proved what he told Judge Kennamer.

The Court: I understand.

Mr. Moore: There is nothing in the judgment in the remotest that tells about any robbery in Florida.

Mr. Varner: My recollection, is, your Honor, if I may say a word. We put in the evidence, the records in the case the habeas corpus proceedings in California which contained Mr. Lill's statement, as I understand it; what he told Judge Kennamer, that is already in evidence, for that reason this witness is being questioned as to that robbery.

The Court: Are you objecting to it?

Mr. Moore: I object.

The Court: Overrule the objection.

Mr. Varner: Now, Mr. Lill, you may answer the question. Do you remember where you were?

A. Yes, sir. His statement to me concerning that was that when they arrived at Edgewater Beach Apartments, Buck Smith was driving the car and he——

The Court: Gentlemen, I see no reason to go into detail about this thing. It will shed no light on this issue. If you will adhere to the predicate you laid in the beginning. I am not interested in the details of any offense and the route that they took down in Panama City Florida in 1949, has nothing to do with this case. If you remember the predicates that you laid and wish to go ahead and pursue that [fol. 223] line, I will permit you to do that.

Mr. Varner: Did he say they robbed the apartment?

A. He said the three of them robbed the two employees in the Edgewater Beach Apartments office.

Q. What did they do then?

A. They left the scene of their robbery at a high rate of speed and were pursued by a deputy sheriff's car from the Bay County Sheriff's office. And as this Sheriff's car

pulled up, he placed a gun out the left vent window and shot at the Sheriff's car as the driver let up on the foot feed so the Sheriff's car could get up there, in line with their car; and that forced the Sheriff's car off the road and it stopped. They proceeded then——

Q. Did Johnny Ray Smith say whether he hit anyone in the Sheriff's car?

A. He did not say.

Q. Did he ever say whether he did or not?

A. No.

Q. Now, did he tell you whether or not they brought the car back to Alabama?

A. Yes, sir. They did.

Q. What did he say about that?

A. He said that he brought it back to where his car was parked, he got out and got in his car, and followed them to Hacoda, a railroad there, Hacoda, Alabama. Johnny Ray Smith cut the gasoline line of the car and took gasoline out and sprayed it over the car and set the car a fire, then they proceeded from there on back to Geneva where he left.

Q. Did you or did you not come to Montgomery with Johnny Ray Smith?

[fol. 224] A. I did.

Q. Were you present in Mr. Davis' office during the conversation between Mr. Davis and Johnny Ray Smith?

A. Yes, sir.

Q. Will you state in substance what took place there and what that conversation was?

A. Mr. Davis asked the three defendants their names, and their ages, and he explained to them that they had a right for their case to be heard in the Southern Division of the Middle District, which was at Dothan. And that they had a right for their case to be presented to the federal grand jury. First, he explained to them that it was a serious offense, and that on *and that on* any offense they would be entitled to a lawyer, and if they could not hire a lawyer to defend them that the Court would appoint a lawyer. And Mr. Davis made the comment that if he were them, he would have a lawyer.

Q. Did Johnny Ray Smith tell Mr. Davis in your presence whether or not he wanted a lawyer?

A. Yes.

Q. What did he say?

A. He said he did not want a lawyer.

Q. What other things were discussed?

A. At that time I believe, I asked Mr. Davis to tell the Defendants Nunn and Jenks, what provisions of the Juvenile Delinquency Act were. They wanted to know whether they could be handled under the federal Juvenile Delinquency Act, and Mr. Davis read to them the provisions of that Act.

Q. Did he say anything about whether or not he could handle them under——

[fol. 225] A. He said they could not be handled under that Act because of the seriousness of the offense, that he would not agree to it.

Q. Who else was in the room there at the time, do you remember?

A. The Deputy Marshal Jack Johnson; James Lewis; Arthur Mason, a Highway Patrolman; and I am not certain who else was present.

Q. There were three defendants there?

A. Yes, the three defendants were there.

Q. Did Mr. Davis explain what the possible punishment for kidnapping was?

A. Yes, he did.

Q. What did he say it was, do you remember?

A. He told them that that statute provided that they could receive life imprisonment and that if the victim had been injured, that the statute provided that the death penalty could be imposed on recommendation of the jury.

Q. Now, did you talk to Judge Keinamer prior to the sentencing, prior to the pleading by these defendants?

A. Yes, sir. I did.

Q. Were you present in court when they plead guilty?

A. Yes, sir.

Q. Did you tell the Judge. Well, what did you tell the Judge about the defendants?

A. The Judge first asked me if the victim, Spearman, was injured? Said he wanted to know if he suffered any injury while he was in the hands of the kidnappers. And I told him that I had talked with Alan Spearman and that he told me that he had not been injured; but that he had been put in fear, and that a portion of the time he was blindfolded.

[fol. 226] And did not know, up to the time of release, what might happen to him. And that he had been given some words of assurance towards the latter part of the time that he was held that they were not going to harm him. That they were going to release him unharmed.

Q. Was that all you told the Judge about these defendants?

A. No. He asked me about their background. And I told him as to Johnny Ray Smith that he had admitted to me that he had participated with two others in armed robbery of the Edgewater Beach Apartments, and that on leaving the scene of that robbery, shot at a car that was pursuing them. And that they had brought the car that they had used in that robbery, which had been stolen that night, which he had stated had been stolen that night, at Geneva, back to Hacoda, Alabama, and that they had burned the car. I also mentioned to him that following the escape of Johnny Ray Smith and the other two defendants, that they had broken into a farm home of a Mr. Lemon near Blountstown Florida, where they had secured a shotgun and which gun was used by them at the time of the kidnapping and bringing the kidnap victim Spearman, into Alabama. And that that gun was in Johnny Ray Smith's possession at the time he surrendered to officers at Geneva.

Q. Did you or did you not tell him of any other cases, any previous cases aginst Johnny Ray Smith?

A. I told him that Johnny Ray Smith had been convicted on two cases. An interstate transportation of a stolen automobile, or the Dyer Act; and that he had on one occasion escaped from the federal correctional institution at Tallahassee.

Q. Did you tell the Judge what the sentence was that [fol. 227] Smith had been given in Florida on the armed robbery or burglary charge?

A. Yes, sir.

Q. What was he given?

A. Twenty-five years.

Q. Did you tell him that was on appeal or did you know it?

A. I believe I told him that that was on appeal, at that time. As a matter of fact that is why they were in jail, and I did not have a positive recollection on that point, but to the best of my belief, I told him that he was awaiting appeal

on that sentence at the time they escaped from jail in Bay County Florida.

That is all.

Cross-examination.

Mr. Moore:

Q. I believe your testimony, Mr. Lill, was that when you first saw Johnny Ray Smith he was handcuffed, sitting in front of the men's wash room in the Osceola Hotel in Geneva, Alabama?

A. That is right. On that particular occasion on that date is the first time I saw him.

Q. Did he have a coat on?

A. No, sir. I don't believe he had a coat on. I did not observe a coat.

Q. Just pants and shirt?

A. Yes.

Q. Was there any indication that he or the people with him had had anything other than the clothes they had on at that time?

A. Yes, sir. We found the two blankets that Jenks and [fol. 228] Nunn identified as blankets they had used while they were out in the woods. Those blankets are still at Dothan.

Q. Were those two blankets all they had with the clothes on their backs?

A. To the best of my recollection it was.

Q. Did Johnny Ray Smith have any other clothes with him?

A. No, Now, Johnny Ray Smith admitted that they had had some clothes they had taken from a suitcase of Alan Spearman. They took his suitcase with them when they left him.

Q. Did he have any of those clothes with him at the time you first saw him?

A. I did not see them.

Q. Did he have a bag or any clothing he took of his own.

A. No, sir. I didn't see any.

Q. Was he furnished any other clothing over there, any time?

A. Not to my knowledge.

Q. Did you furnish him any?

A. I didn't furnish him any, no sir.

Q. All the clothes he had, you saw him when he came to Montgomery, didn't you?

A. No, when he came to Montgomery he was wearing a suit.

Q. Where did he get the suit?

A. I have no positive recollection as to where he got the suit.

Q. Was it the same suit he had on when he was arrested?

A. No. Not to my knowledge. I don't believe he was wearing a coat at the time he was arrested. Now, I didn't [fol. 229] see a coat, there may have been one brought along by other officers, that was brought over to Dothan.

Q. But he may have come up here in the same clothes he had on when picked up, you are not sure of that?

A. No, I am not positive. If they were, I believe they had been pressed up.

Q. Now, you say you examined him when he was down there at the Geneva Hotel, when he was served the coffee, what was the condition of his clothes?

A. The condition of his clothes when I saw him in the chair there, and at the time he was up in the room and I took him to Dothan. When I first saw him I observed there was filth and dirt underneath the Geneva Hotel was on his clothes and a few cobwebs around his hair and face. And he washed those off while upstairs.

Q. The only thing you saw on his clothes was just a little dust?

A. No. I would not say a little dust.

Q. Were they dirty?

A. They were pretty dirty, yes.

Q. Did they show signs of any other sort of stains, food stains, drink stains, sleeping stains, been out in the woods?

A. I have no recollection as to the stains. There may have been some on there but there were no blood stains that I observed.

Q. Did you analyze them when you made your investigation?

A. No. I didn't analyze them I just observed them.

Q. You don't know what those stains may have been on

A. I would say they certainly were not blood stains. What I observed.

Q. Can you tell blood stains just by looking at them?

[fol. 230] A. I believe that I can. If a finger bleeds and gets on a shirt or clothes I can tell whether it is blood or not.

Q. Do you tell me if there are two or three different stains up and down my arm, that you can definitely tell me if they are blood stains?

A. I am not saying I can definitely tell that they were blood stains, no.

Q. There were stains on there it might have been something else?

A. I am not saying that there were any stains on there. I said I observed no stains, but it was silt and dust from underneath the Hotel, what dirt that would be on his clothes at the time I saw him was cobwebs.

Q. Was there any evidence on his clothing of having gone through the woods for several days?

A. Yes, the bottom part of his trousers had small snags in them, like they might have been cut with briars.

Q. Were the bottom of his cuffs clean or did they show signs of dirt and mud?

A. I have no positive recollection as to just what the bottom of his trousers looked like.

Q. How about his shirt, was it torn?

A. I didn't observe that his shirt was torn.

Q. But his arms were scratched?

A. Yes, the back of his hands and lower part of his arms were scratched.

Q. You say the lower part of his arms, do you mean that part covered by his shirt sleeves?

A. No, I can best explain that to you by the photograph. He had his sleeve rolled up, so that his arms were exposed there, and it was right up on the back of his arms.

[fol. 231] Q. What was the weather like at that time?

A. The weather at that time was about like it is now. The nights were pretty chilly and the days were pretty cold.

Q. As a matter of fact, it would be downright cold if

you were out here with your shirt sleeves rolled up, wouldn't it?

A. I expect it would be, yes sir.

Q. Does it appear reasonable to you, that he was running through the woods with his shirt sleeves rolled up?

A. I can say how I observed him at the time I saw him, as to what clothes he had, I made no search underneath the Hotel, as to whether he had clothes under there or whether he had any other garments.

Q. Well, weren't his shirt sleeves rolled up when he went in there to wash his hands in that Hotel.

Mr. Varner: We object to that as being immaterial.

The Court: Overruled. This is cross examination.

Mr. Lill: I can't say positively whether they were rolled up at the time I saw him sitting in the chair or not. You see, this has been six years ago, and to have a positive recollection, I want to recall for you if I can about it, but I have no positive recollection of that, whether he had his shirt sleeves rolled up or not.

Q. You made notes of these things as you went along, didn't you?

A. I make notes of some of the interviews that I had with him.

Q. Do you have those with you?

A. Yes, sir, I do have.

Q. Would they help your recollection any?

[fol. 232] Yes, they might, on details.

Q. All right, sir, when you brought him from the lobby you took him upstairs and questioned him about an hour in Geneva, didn't you?

A. No. We brought him a meal and let him eat that meal.

Q. Did he eat that meal.

A. He did.

Q. Was the food hot or cold?

A. It looked like it was hot. It looked fresh, lets say that.

Q. But you don't know whether it was hot or cold, do you?

A. No.

Q. Were you trying to talk to him all the time he was eating?

A. No.

Q. As a matter of fact, weren't you questioning him pretty thoroughly about those other two boys that were with him, who had not been picked up?

A. No.

Mr. Varner: We object, he has just answered that he was not questioning him.

The Court: Overrule the objection.

Mr. Varner: We except.

Mr. Moore: Will you answer.

A. We asked him where the other boys were, but whether it was while he was eating or while he was waiting for the food to come up or after he had finished. I believe it was while he was waiting for the food to come up, we asked him those questions, about where the other boys were.

Q. Did you question him any more at that time?

[fol. 233] A. No. We were trying to find out where the other boys were, and that is the line of questioning at that time.

Q. As a matter of fact you kept it up for a considerable time, while you sent officers out to check his story, didn't you?

A. No. He said they had left early that morning at 3:00 or 4:00 o'clock and were trying to steal a car and head up north.

Q. Did you send a man out to check to see if they had stolen a car?

A. I didn't personally send anybody out. I know that two officers did go out to see if the car was stolen that he was referring to. Or a similar car that was believed to be the car he was referring to, to see if it was stolen.

Q. Now, let me ask you this Mr. Lill, apparently Mr. Williams was the agent in charge out of Mobile is that correct?

A. That is right.

Q. Did he handle this case up until the time of capture, is that right?

A. No. I handled the case, and he was only in on it that day and the succeeding night. He was in charge of the office.

Q. It was your case. You were running the case?

A. He was running the case while he was there because he was my agent in charge. Or was at that time.

Q. Who was asking these questions there in the Hotel?

A. Mr. Williams and myself.

Q. At that time, the time you saw Johnny Ray in there and the time he was carried upstairs, did you ever see him limp?

A. No, sir.

Q. Did you ever see him limp at any time?

[fol. 234] A. No, sir.

Q. When did he tell you what happened to him coming out of the jail the time he got hurt, how he got hurt?

A. I don't have a positive recollection when it was. I believe it was while en route to Dothan, that he mentioned while he was escaping from the jail down there that an improvised rope made out of bed sheeting had broken and he fell several feet to the ground.

Q. Did he tell you he bruised his back at that time?

A. He said it knocked the air out of him, but that in a few seconds he was al- right.

Q. What was bruised? Was his back bruised?

A. He didn't say, he mentioned also, that when he went through the cell where they had cut the hole, that they had soaped their bodies and that he had scraped his side going through there.

Q. When did he tell you that his back was bruised?

A. That was at the time he told us about the other.

Q. That was on the ride to Dothan?

A. That is right.

Q. To refresh your recollection now, I have here in my hand, the testimony you gave in this California, and which is part of the records at this time. On Page 100 of that testimony—First on Page 68 you say, he did not complain at all about his physical condition. Then on Page 100 you said: "I think he said he bruised his leg as he fell." Now, was it his back or his leg?

A. I have no positive recollection which he said he bruised.

[fol. 235] Q. Now when you carried him to Dothan, Alabama, where did you carry him first?

A. We took him to the Commissioner's office.

Q. How long did that last?

A. It lasted from about 2:15 to 3:20, while the proceedings didn't take all of that time. When we first took him up there, the Marshal made arrangements to have the hearing in an office, which was larger than his office, because he didn't have space in his office to have the hearing and it was held across on the other side.

Q. Were Nunn and Jenks there?

A. A call came in, just as we came into the Marshal's office that they had been apprehended.

Q. Were they all three carried in together?

A. Johnny Ray Smith was carried in first. It is my recollection that the proceedings was almost over for Johnny Ray before the other two arrived.

Q. Were they heard at the same time, along with Johnny Ray?

A. I am not positive whether he did or not. The Commissioner heard Johnny Ray and then he heard the others but they were together at a short period of time that they were both in there. Whether or not he asked them any questions together, or explained anything while they were together, I don't have a positive recollection as to that.

Q. All right, sir. And then who carried Johnny Ray to jail?

A. James Lewis, Deputy Marshal Benton Foy, Tullis Easterling, and myself.

Q. Who questioned him with you that night?

[fol. 236] A. He was not questioned that night.

Q. Was Mr. Ed Driggers there? Do you know Mr. Driggers?

A. Yes, I know Mr. Driggers. He took the picture as we were en route from the Post Office Building to the County Jail.

Q. Was he present in the jail when you stripped Johnny Ray down?

A. I didn't see him there. He could have been in the jail.

Q. You didn't see him in the jail?

A. He could have been there, I did not see him. I didn't see him in the jail portion on the second floor. I don't believe that he was up there.

Q. Your recollection is that he was not up there?

A. That is my best recollection.

Q. Did you question Johnny Ray at all that night?

A. No, sir.

Q. When was your first interrogation of him?

A. That was in the afternoon of November 19, 1949.

Q. Who was present then?

A. James Lewis and myself.

Q. I believe you testified just a moment ago that at this interview he told you about this alleged Florida crime, is that right?

A. He said something about it, at that time, yes.

Q. What do you mean by something about it. Did he discuss it freely or not.

A. No, it was not discussed in detail at that time.

Q. Was it discussed in detail on the 19th?

A. Yes, it was.

[fol. 237] Q. When?

A. At about 3:15 PM, approximately 3:15 PM.

Q. Who was there then?

A. Deputy Marshal Benton Foy and Detective Lewis.

Q. They were both there when you had this conversation in detail about what happened in Florida?

A. Yes, sir, that is right.

Q. Did he ever tell you at that time that he shot Bill Gilbert?

A. He said he shot——

Q. Did he ever tell you that he shot Bill Gilbert?

Mr. Davis: We object.

The Court: Overrule the objection.

Mr. Lill: It is my recollection that he did.

Q. You testified a moment ago that he never told you he shot anybody?

A. During the interview with him, he mentioned that he had seen Bill Gilbert down in Florida and that that was the one he shot. Of course that he didn't know who was in the car at the time the shooting took place I imagine.

Q. Do you know that as a fact or is that your imagination? Didn't you just testify a moment ago that, on direct, that he said he shot but he didn't know who he hit or who he shot at?

A. He shot the officer's car, yes. But it was also men-

tioned during the conversation that he had shot Bill Gilbert.

Q. You didn't testify to that awhile ago, as a matter of fact you said he didn't tell you that?

A. He testified to both. I mean he stated both.

[fol. 238] Q. Did he at that time tell you that he shot Bill Gilbert?

A. He first told me he shot at the car and further in the conversation he mentioned that he had shot Bill Gilbert.

Q. Johnny Ray Smith told you that he shot Bill Gilbert?

Mr. Varner: We object.

The Court: Overruled.

Q. Is that your testimony?

A. Yes, sir.

Mr. Varner: We object.

The Court: I sustain that objection. Let's proceed with the cross-examination.

Mr. Moore:

Q. Mr. Lill, did you interrogate Jenks in the local county jail?

A. Yes, sir.

Q. When did you interrogate him?

A. On November 20, 1949.

Q. Did you interrogate Nunn?

A. Yes, sir.

Q. When?

A. The same day.

Q. Did you interrogate them together or separately?

A. Separately.

Q. During the interrogation of Jenks did you discuss with him the Juvenile Delinquency Act?

A. Yes, sir, I did.

Q. What did you advise him?

[fol. 239] A. He asked me if it could be handled under the Juvenile Delinquency Act, that, that a native of Tallahassee had talked and had mentioned the Act to him. And I told him that federal Juvenile Delinquency Act provided that a juvenile to be handled under it would have to be at the consent of the juvenile and also at the consent of the

United States Attorney. That I did not believe it would apply in case of serious crime; but that he could ask the United States Attorney, at the time that he came before the U. S. Attorney.

Q. How long did you tell him he would get under that Act?

A. I told him that the Federal Juvenile Delinquency Act, if he was handled under that, would be to the age 21, up to the age 21.

Q. How old was Jenks at that time?

A. Seventeen.

C. Did you talk to Nunn along the same lines?

A. Now, statements were taken from them separately, I may have talked to them together and it might have been that they were both together at that time. I am not positive, my recollection is not clear as to that.

Q. Did you advise Nunn exactly the same thing?

A. I don't know. If they were together, there was only one advice, I mean only one time that I explained it to them, and if they were together the same thing was said to him.

Q. I hand you herewith the Government's Exhibit No. 4, and ask you to examine it. Is that the statement which you took from Jenks?

A. Yes, sir. It is.

Q. Did you take one from Nunn?

A. Yes.

[fol. 240] Mr. Moore: May I show him the other statement?

Mr. Davis: If he wants to introduce the statement of Nunn, we have no objection.

The Court: It will be admitted and marked "Movant's Exhibit No. 4."

Mr. Moore: I ask you to examine Movant's Exhibit No. 4.

A. This is a statement I took from Richard Dale Nunn, on November 20, 1949.

Q. Did you personally write both of those statements?

A. Yes, sir, I did except the final paragraph, which is in their handwriting.

Q. The rest of both statements are in your handwriting?

A. Yes, sir.

Q. Did you supply any of the words or figures in those statements for the defendants?

A. The date of November 12, 1949.

Q. I am not asking you to be specific, but I am asking you again did you supply the words in those statements?

A. No. These are their statements; as to their account to me of what transpired concerning the kidnapping and harboring there.

Q. Were those statements taken on the 20th?

A. That is right.

Q. What time of day was that?

A. They were taken late in the evening, or late in the afternoon, or evening of November 20th.

Q. Now, when did you bring Johnny Ray Smith to Montgomery?

[fol. 241] A. We left Dothan shortly after 7:15, on the morning of November 21, 1949. He was checked out of the Houston County Jail at 7:15 A.M. that day.

Q. Did you bring him?

A. Yes, he rode in the car that I drove.

Q. Who else was in that car?

A. I do not have a positive recollection. I could tell you who I believe was in the car.

Q. Tell me who you believe was in there.

A. I believe it was Mr. B. H. Lisenby, was at that time was Court Crier; and Detective James Lewis.

Q. To refresh your recollection I read in your testimony given in California on Page 79. "That is all the . . . I have of Johnny Ray Smith."

Q. All right, sir, when was the next time you saw him?" And who was present at that time?"

A. The next time I saw him was at the time he was sentenced in Montgomery, Alabama." That statement is correct, is it?

Mr. Lill: Yes, sir. This is my present recollection, at the time I testified out there, I had no recollection of that testimony that I had brought him to Montgomery.

Q. This testimony is erroneous at the time of the Habeas Corpus proceeding, in that particular point?

A. Let's say it is not complete. It is no erroneous, because my testimony is correct to the best of my recollection at that time.

Q. But your recollection was faulty then at that time?

A. Yes, sir. When I said that was the last time I saw him.

Q. Were you living in Dothan at that time?

[fol. 242] A. Yes, my home is in Dothan.

Q. Did you, on the morning of November 20, 1949, have occasion to read the Dothan Eagle at that time?

A. Yes, sir.

Q. Did you read an article in it stating this kidnapping at that time?

A. I can't say that I read the article at that time, but I believe that I did. I am not positive that I did.

Q. I hand you that article and ask you if that appeared in the Dothan Eagle in the Sunday paper?

A. This is the article that appeared in the Dothan Eagle in Dothan, Ala., November 20, 1949.

Q. I call your attention to the last page of that article, about the 4th paragraph from the bottom. In that article does it say substantially or words to this effect, that Johnny Ray Smith was complaining of an injured back which he received in his escape from the jail?

A. The 4th paragraph from the bottom reads: "James.

Q. I believe it is the 5th paragraph then.

The Court: Is this in an attempt to refresh his recollection?

A. Yes, sir. He displayed an injured back.

Mr. Lill: He displayed an injured back which he said was caused when he struck a second floor window after he leaped from the top floor." That is on the 7th line from the top.

Q. Did you read that on that Sunday morning?

A. I can't say that I read it on that Sunday morning. I clipped that article and sent it in. I probably did read it on that Sunday morning.

[fol. 243] Q. Do you have a positive recollection now about that?

A. I can't say.

Q. Did you inspect Johnny Ray Smith's back after you read that article?

A. No, sir. Because I had already asked him if he wanted a Doctor, and he said he didn't.

Q. Is "he" referred to in that article, Johnny Ray Smith?

A. No. I am not positive because I did not write the article, and there are two other defendants, referred to by whoever did write the article.

Mr. Davis: We object.

The Court: The court has objection to extraneous and immaterial matter being entered. I don't see that is material.

Mr. Moore: May it please the Court, the point in showing it is to show that Johnny Ray Smith wanted to put the Agent on notice.

The Court: I believe he testified on that point.

Mr. Varner: He testified that he can't say that he saw him on that day, before the court trial.

Mr. Davis: Mr. Lill said he saw Smith stripped and the man did not complain of it.

Mr. Varner: We move to strike his testimony relative to this newspaper article.

The Court: Motion overruled.

Mr. Moore: You were in charge of this case, back in Dothan, weren't you?

A. Yes, sir.

Q. At that time, in Dothan, did you advise the jailor to hold Johnny Ray Smith incommunicado?

[fol. 244] A. No, sir.

Q. Did you advise him not to keep him incommunicado?

A. Johnny Ray Smith was in custody of the United States Marshal and I advised the jailor nothing.

Q. Nothing either way?

A. Except that he was entitled to a bondsman, and a lawyer at any time.

Q. You said you advised him of his rights. When did you do that?

A. I advised him of his rights at Geneva, when we were there in the room there on the second floor of the Hotel. I told him he didn't have to make any statement and that he was entitled to a lawyer, I advised him of his rights each time that I talked with the defendant. And I advised Johnny Ray Smith of his rights.

Q. Tell me when you advised Johnny Ray Smith and substantially what you said?

A. I advised Johnny Ray Smith of his rights when I interviewed him at Dothan on the early afternoon of November 19, 1949. I advised him that he was entitled to a lawyer, and didn't have to make any statement, any statement he made might be used in a court of law. I advised him as to the same rights the following day.

Q. Is that all you told him, that a statement that he made could be used against him? Is that the only right you advised him of?

A. I believe so.

Mr. Davis: He has already stated what he advised him.

The Court: Overruled objection.

Mr. Moore: Will you answer?

[fol. 245] Q. Now, when did you advise Nunn and Jenks of their right to the Juvenile Delinquency Act?

A. That was on November 20, to the best of my recollection.

Q. What time of day was it?

A. It was following the time that I talked with Johnny Ray Smith.

Q. They were in the cell together, were they not?

A. I am not positive because the jailor followed me around to the interview room and I don't know whether they were together or not.

Q. You said you took their statements separately, did you not?

A. I don't know whether they were together or not.

Q. You said you took their statements and if you talked to them it had to be in the cell, didn't it?

A. No. I talked to them in the interview room.

Q. Together?

A. Now, I believe they were together a part of the time. But the statments were taken separately. I interviewed each one of them separately for the statements.

Q. You had them together first, though, didn't you?

The Court: That is repetition.

Mr. Moore: All right. Therefore you advised them of these rights while taking their statements?

A. I advised them of their rights before I took the statements, yes, sir.

Q. You advised them of their rights.

A. At the outset of the interview.

Q. You advised them of their rights under the Juvenile [fol. 246] Delinquency Act before you took their statement, didn't you?

A. No, I am not certain that that came up before I took their statements.

Q. Are you sure it didn't come up?

A. I am not positive when that did come up.

Q. Did you discuss with Johnny Ray Smith the fact that these boys had asked you their rights under the Juvenile Delinquency Act, and what you told them?

A. I don't recall if I did or not.

Q. Do your recall that you didn't?

A. No.

Q. Is it your testimony that you don't know?

A. I don't know that I did.

Q. You don't know if you did, either, did you?

A. That is right.

Q. All right, when you came to Montgomery, Alabama, on the particular morning in question, when you got up here, who did you talk to first as far as Court Officials is concerned?

A. I talked to the United States Attorney, Assistant U.S. Attorney at that ime, Mr. Davis.

Q. Mr. Hartwell Davis?

A. Yes, sir.

Q. That was the first man you talked to when you got here?

A. Yes. To the best of my recollection he is the first man I talked to.

Q. Did you discuss the case with Mr. Davis?

A. Yes, I did.

[fol. 247] Did he tell you he thought the Judge would like to hear what you had to say about it?

A. It is my present recollection that he did not. He may have, I know that I——

Q. Did he go with you to the Judge's chambers, at that time?

A. I don't believe that he did.

Q. Let me refresh your recollection by reading Page

Mr. Varner: We object, your Honor, we don't see any materiality.

The Court: Objection is overruled.

Mr. Moore: Page 85, in the testimony you gave in habeas corpus proceedings, regarding the conversation with Judge Kennamer. "It took place in his chambers prior to the appearance of Johnny Ray Smith before Assistant United States Attorney Hartwell Davis. Did Judge ask you anything about the man's background; and I mentioned to him about the Florida offense. This is on Page 84. Mr. Davis suggested I talk to the Judge on it, concerning the fact that he was defendant on the case in Florida, and it was on his suggestion that I talk to the Judge." That statement is correct is it?

A. It was my recollection at that time, it was; but since then I have talked to Mr. Lisenby who is the Court Crier, and he told me that the Judge asked him to.

The Court: We are not interested in what Mr. Lisenby told you.

Mr. Moore: Did Mr. Hartwell Davis ever tell you that the Judge might like to hear what you had to say?

A. I can't say he did, and I can't say that he didn't.

Q. In other words, this habeas corpus testimony may be incorrect?

[fol. 248] A. That is right.

Q. Did Mr. Hartwell Davis go into the Judge's chambers with you, when you went in there to talk?

A. It is my present recollection that he didn't.

Q. That he did.

A. That he did not.

Q. In other words if you made the statement in California, that Mr. Hartwell Davis went with you into the Judge's chambers, that is incorrect?

A. If I made the statement in California it was on my recollection at that time, if I might explain to the Court.

Q. Page 86 of the testimony. "To the best of my recollection it was before the defendant was in the office of the Assistant United States Attorney. And in answer to the question who is the Assistant U. S. Attorney. "Mr. Davis. "And I went in at the request of the Assistant U. S. Attorney, Mr. Davis, and to the best of my recollection I was

accompanied by Mr. Davis." Did you make that statement in California?

A. I made that statement in California, yes, sir.

Q. Is it your present recollection that it was correct or incorrect?

A. If it please the Court, I would like to correct that. It is my present recollection that it was Mr. Lisenby, instead of Mr. Davis, who accompanied me in the chambers of Judge Kennamer. I made no notes at the time and I was testifying to the best of my recollection then, and since then my recollection has been refreshed.

Q. By Mr. Hartwell Davis?

A. No, sir.

[fol. 249] Q. By whom?

A. By Mr. Lisenby.

Q. Did you discuss it with Mr. Hartwell Davis?

A. Yes. That is since I talked with Mr. Lisenby.

Q. Did you discuss the kidnapping with the Judge? Did you give him the full background of it?

A. I did not give him the full background of the kidnapping. I just mentioned that he had admitted that he had kidnappped a man named Alan Spearman, and brought him to Alabama.

Q. Didn't you just tell on direct, that you talked to the Judge about that, and about the shotgun and everything surrounding the kidnapping?

A. Yes, certainly, that is right.

Q. You told the Judge all about the kidnapping, didn't you?

A. I did not tell him all the facts.

Q. What did you tell him that you knew.

A. Well, there were quite a few details I did not tell him.

Q. You told him the basic structure of the crime as you knew it, didn't you?

A. Yes, that is right.

Q. In his chambers?

A. I told him that Johnny Ray Smith had admitted the kidnapping.

Q. And you also told him the other things you have told on direct, didn't you?

A. That is right.

Q. So if in your testimony in California you said you talked to the Judge about the background, you were erroneous at that time, weren't you?

Mr. Davis: We object to that question.

[fol. 250] The Court: I sustain the objection.

Mr. Moore: Have you discussed this matter with Mr. Bill Gilbert since you have been up here?

A. No, sir.

Q. Had you discussed it with him prior to this trial?

A. No, sir. Mr. Gilbert lives in Panama City. I have not discussed it with him at all. I have talked with a number of witnesses trying to refresh my recollection on it, but I didn't with him because there was no refreshment there to be made on it.

Q. Did you go to Mariana, Florida and testify in this July 1949 stolen car case?

The Court: Are you seeking to lay a predicate, Mr. Moore?

Mr. Moore: Yes, sir.

Q. "I went to Panama City," did you testify to that?

A. No, I didn't testify on that.

Q. You had worked on the case, hadn't you?

A. Yes, sir.

Q. When this indictment was returned in the federal court there, you did not testify before the grand jury at that time? Is that your testimony?

A. It is not my recollection that I testified there. I believe it was handled by Agent Easterling. I am not positive, but I don't have any recollection now that I did testify there.

Q. Was Agent Easterling ever with you in the Dothan jail when you were making these interrogations?

A. He was with me at the time we committed Johnny Ray Smith to jail.

[fol. 251] Q. He didn't interrogate him, did he?

A. No. He left then and he was not with me in November.

Q. He was never with you when you questioned him about this stolen automobile?

A. He was with me when I talked with him in July but not in November.

Mr. Varner: We object to that, unless he will connect it up.

The Court: He has not advised me that he does not intend to connect it up. Mr. Moore, do you intend to connect and make material this testimony regarding his going to Mariana Florida and testifying before some grand jury.

A. Only in the event that this witness remembers testifying before that grand jury at which an indictment was returned on that case on July 19, 1949.

The Court: Do you intend to pursue it further?

Mr. Moore: No, sir.

Q. That motion will be granted.

Mr. Moore: Mr. Lill, do you know Mr. Eddie Whitten?

A. Yes, sir.

Q. How long have you known him?

A. I have known him since I have been in this court district.

Q. How long is that?

A. Approximately ten years.

Q. Did you know him in November 1949?

A. Yes.

Q. What was his job?

A. He was federal probation officer.

Q. Where was his office?

[fol. 252] Q. Do you know Mr. J. N. Bass?

A. Yes, I do.

Q. Where is he quartered?

A. In the same office, the Probation Office.

Q. What is his job?

Mr. Varner: May it please the Court, we object to this.

The Court: Overruled.

Mr. Moore: Do you know Mr. W. O. Vinson?

A. Yes, sir. I believe he is in the same office, there is a Mr. Vinson in that office.

Q. Is he also a probation officer?

A. Yes, sir.

Q. Let me read from your testimony in California. Page 89.

The Court: What is the purpose of it, Mr. Moore?

A. To further show the inconsistency of this witnesses' testimony throughout his hearing, out there and to discredit his testimony here and now unless he decides to go ahead and testify.

The Court: Go ahead and read it.

Mr. Moore: "Well the Court is not in continuous session in the Middle District of Alabama. The Judge does not have the benefit of probation reports like he does in a district where the court is in session. And quite frequently the United States Attorney or Assistant United States Attorney requests the background concerning the defendant, who he is familiarizing for the Judge having the a-cendency, and it was in the laying of the background of this defendant that I talked to Judge Kennamer. I had a finger print [fol. 253] record with me and some background information at that time."

Q. Did you say that in effect to the Probation Officer at that time?

A. No, sir. I certainly didn't. My job is to gather facts concerning federal violations over which our office has jurisdiction and that is what I was serving at.

Q. At that time were you aware that one of these probation officers that were in court——

Mr. Varner: We object to that.

The Court: Sustain the objection.

Mr. Moore: Do you still contend that this proceeding was the law in Alabama in November 1949?

Mr. Davis: We object.

The Court: Sustain that objection.

Mr. Moore: Is that statement true or false I have just read?

Mr. Davis: We object.

The Court: Sustain that objection.

Mr. Moore: Mr. Lill, after the defendants had been sentenced where were they carried on that particular day, November 21, 1949?

A. I don't know positively. I understand indirectly where they were carried.

Mr. Davis: Unless he knows he can't testify.

Mr. Moore: Did you go to the Marshal's office after that sentence?

A. I don't know.

Q. You don't recall whether you had any conversation with Johnny Ray Smith at that time, or not?

Mr. Varner: We object.

[fol. 254] The Court: Overruled.

Mr. Moore: Do you recall any conversation with Johnny Ray Smith in 1949, you were interrogating Johnny Ray Smith in Dothan, Alabama, and you were asking a number of questions about the shooting of Bill Gilbert? Do you recall that?

A. Yes. I recall that yes, I do.

Q. Did he ask you at that time, why you were interested in that, since it was not a federal offense?

A. He may have.

Q. Did you make the statement that officers of the law when shot generally join forces to bring the culprit to justice?

A. No, I didn't do that. I explained to him that was a theft of interstate stolen automobile involved and that was my interest in the investigation.

Q. Why were you questioning him about this officer down there.

A. Because it was in relation to the offense under which I was investigating it.

Q. When you were in Mr. Hartwell Davis' office, at the time the defendant was there, prior to your coming into court, about how long were you in there?

A. I would judge that it was ten or fifteen minutes.

Q. When he read Section 1201 to him, did he explain it in any way?

A. Yes, he did.

Q. What did he tell them?

A. He explained to them that the penalty on that offense. That the offense was serious, and the penalty was that it would provide for a sentence up to life imprisonment. He also mentioned to them, that I had told him that the victim [fol. 255] was not injured; but that if he had been injured it could have provided death penalty, or if the jury recommended it.

Q. Did either of you undertake to explain to them what harmed or unharmed was, the legal significance of it, or what it was?

A. I did not.

Q. Did Mr. Davis?

A. I don't recall that he did.

Q. Did he explain to them the Juvenile Delinquency Act?

A. He read them the Act, is my recollection. He got a book down from the shelf and read them that.

Q. Did you tell him that you explained it to them in Florida and they expected to be prosecuted under that Act?

A. No, sir. I told him that they wanted it explained to them. I told him what my impression of the Act was and I asked him if it was correct.

Q. Did you tell him that you had explained it to those boys?

A. I told him that they had asked me about it. I did not tell him I had explained it to them in those words.

Q. That is what you said a moment ago.

A. Well, I told him that I explained it to them, I did explain it to them, yes, sir. But whether or not I told Mr. Davis that I explained it to them, I don't believe I did. I asked Mr. Davis to explain it to them.

Q. Did you tell Johnny Ray Smith on the way up here from Dothan or any other time, that these two boys were pleading guilty?

A. I don't believe I did. Because the Commissioner's hearing, that was their statement to the Commissioner [fol. 256] that they desired to plead guilty. And the Commissioner asked the Marshal to bring them on to Montgomery. There was no question about it.

Q. Did you ever tell Jenks or Nunn that this man had been convicted of counterfeiting, or that he was a counterfeiter?

Mr. Varner: We object to what he told him.

The Court: Sustained.

Mr. Moore: Who arranged for the hearing in Montgomery, Mr. Lill?

A. I don't know positively, but usually it is arranged by the U. S. Marshal, who brings them to Montgomery.

I called Mr. Davis by phone, and told him about the background of the offense.

Q. Did you tell him at that time that you had gotten these boys to plead guilty?

A. No, sir. I did not.

Q. You just told him they were coming up here?

A. I told him that they had told the Commissioner that they wanted to plead guilty, and I believe to the best of my recollection, that he told them that they could come up the following Monday. But I am not positive as to that. I want to be absolutely correct. I am not positive but I believe that is what transpired.

Q. Well that was the reason to bring them on to Montgomery because they wanted to plead guilty, is that true?

A. That is right.

Q. I think that is all.

The Court: All right, re-direct examination. Mr. Lill, you stated here the different things you told Judge Kennamer in his chambers, you testified as to the places and [fol. 257] to where you received your information on a considerable portion of it, there is no testimony here, as I recollect it, where you get your information, that prompted you to tell him about the burglary of Mr. Lemmon's home in Florida.

Mr. Lill: That came from the defendant, Johnny Ray Smith, Richard Dale Nunn and Robert Peter Jenks.

Q. Did Smith make a statement to you to that effect?

A. He made an oral statement, yes, sir.

Q. Where was that?

A. That was at Dothan and in the Houston County jail.

Q. What was the substance of that statement that Smith made to you regarding the burglary of Mr. Lemmon's home in Florida?

A. Smith told me that the shotgun that he had in his possession at the time he was arrested, was the one to quote him, He said: "That we got from that house at Blountstown."

Q. Where did you get information that it was Mr. Lemmon's home?

A. That came from our Agent Easterling who gave me the information that it was Mr. Lemmon's home.

Q. You did not get the information from Smith?

A. No, sir. He did not say it was Mr. Lemmon's home.

Q. All right. What was the basis of the information you gave Judge Kennamer regarding Smith's escape from a federal institution at Tallahassee?

A. That came from a finger print record that I had in my possession.

Q. Is that finger print record in evidence?

A. I think not, your Honor, we will get it in evidence. [fol. 258] Mr. Varner: Tell me this, if I may your Honor, shorten it, did or did not Mr. Smith admit to you that he did escape from the federal institution at Tallahassee?

A. Yes, sir, he did.

Mr. Varner: I think that makes it unnecessary to introduce the fingerprint records.

The Court: Going now, to the same conversation that you said you had with Judge Kennamer in his office. You itemized several things, or listed or enumerated several things you said you told him prior to the time they entered their plea. Did you tell him anything regarding previous offenses that this man was supposed to have committed that he had not admitted to you?

A. No, sir. I didn't.

The Court: All right. Any further cross-examination?

A. No, sir.

The Court: Any re-direct?

Mr. Varner: No, sir.

The Court: Call the next witness.

Mr. James Lewis, called as a witness, being duly sworn, testified as follows:

Direct examination.

Mr. Varner:

Q. State your name, please.

A. James R. Lewis.

Q. What was your business on July 19, 1949?

[fol. 259] A. I was a dectective at Dothan, Alabama, a police detective.

Q. Did you on that occassion have cause to interview one John Ray Smith?

A. Yes, sir.

Q. Do you know him?

A. Yes, sir.

Q. Do you see him in this court room?

A. Yes, sir.

Q. Will you point him out?

A. He is sitting in the middle over there?

Q. On what day did you see him first?

A. The first time I saw him. The first time was in July about the middle of July in 1949.

Q. Now, did you see him in November of 1949?

A. Yes, sir.

Q. Regarding what, did you see him at that time?

A. I saw him in Geneva, Alabama.

Q. Were you participating in the kidnapping case?

A. Yes, sir.

Q. Where did you see him in Geneva?

A. When he came up through a trap door in the men's room of the Osceola Hotel, in Geneva.

Q. He came up in the men's room?

A. Yes, sir.

Q. Where did he go from there?

A. Upstairs to a room.

[fol. 260] Q. When he came up do you recall how he was dressed?

A. To the best of my recollection he had on a sport shirt and a pair of trousers.

Q. Were there any dark stains appearing to be blood stains, on his clothes?

A. I don't recall any blood stains, he was pretty dirty.

Q. Did you see him walk there at that time?

A. Yes, sir.

Q. Did you notice him limping?

A. No, sir.

Q. Any favoring of any limbs, or his back, to indicate any injury?

A. No, sir.

Q. Did you participate in what they call a "Strip search" of Johnny Ray Smith?

A. I was present. I did not participate in it.

Q. Before we get into that, now, were you present and did you or did you not see him eat a meal in the room at the Osceola Hotel?

A. Yes, sir.

Q. Did he eat it?

A. Yes, sir.

Q. Tell us about the so called, "strip' search?

A. That was in the Houston County jail at Dothan, Alabama. Later in the afternoon, on the same day of his arrest. And Mr. John Lill conducted it.

Q. Well what was done there at that search?

A. He was asked to remove his clothing all except his shorts, and they were examined.

[fol. 261] Q. Did you see him standing up there in nothing but his shorts?

A. Yes, sir.

Q. Did you notice any cuts or abrasions or bruises on him?

A. I don't recall anything outstanding. There could have been some scratches on his back of his hands or possibly on his legs.

Q. Did you see any bruises on him?

A. No, sir.

Q. Did you see any blood on him?

A. No, sir.

Q. Did he complain to you that he was injured at any time?

A. I believe it was on the way from Geneva to Dothan. I was riding on the back seat with him, in an ordinary conversation we talked about how he slipped down the rope made of sheets from the Bay County jail. He slipped just before he got to the bottom and fell and it knocked the breath out of him. That was the only complaint I ever heard from him.

Q. Did he ask for a Doctor?

A. No, sir.

Q. Did he indicate that he was still injured from the fall?

A. No, sir.

Q. What is your business now, Mr. Lewis?

A. I am working with Martin Theaters.

Q. You are no longer employed as a law enforcement officer?

A. Not at this time.

Q. In no way connected with the police?

A. No, sir.

[fol. 262] Q. Now, were you present at the time when John Lill, do you know John Lill?

A. Yes, sir.

Q. Were you present when a conversation between John Lill and Johnny Ray Smith was had in which they discussed the robbery of the Edgewater Beach Apartments?

A. Yes, sir.

Q. When was that?

A. That was on the following afternoon in the Houston County jail, in Dothan, at about 1:00 o'clock or something like that.

Q. Did anybody there make any threats in your presence, did they make any threats or promises to Johnny Ray Smith?

A. No, sir. They didn't.

Mr. Moore: We object.

The Court: Overrule that objection.

Mr. Varner: Now who was there at the conversation, who was there besides yourself and Johnny Ray Smith and John Lill?

A. No, one that I recall.

Q. Did Johnny Ray Smith make a statement relative to the taking of a car at Geneva?

A. Yes, sir.

Q. What did he say?

A. There was a plan between Buck Smith, Snooks Driver and him.

The Court: Are you telling now what Smith told you on that occasion?

A. Yes, sir.

[fol. 263] The Court: All right, go ahead.

A. Said that Snooks Driver had a car spotted at a cotton mill in Geneva, Alabama. And Snooks went and got the

car and came back and picked them up. And Johnny Ray Smith had his car which was a Packard convertible. They drove out from Geneva to some place where they left Johnny Ray's car. They got on the Plymouth, then they went to Panama City Beach, located along the Beach was this Edgewater Beach Apartments. Just west of Long Beach I guess. They did go there with the intention of robbing the place and they did rob it. In making their get-a-way they saw a car gang on them, and also hears the siren blowing, he was already in the back seat or climbed over in there and he had a revolver and stuck it out the rear left window and fired a couple of shots at this car, that was following them and it stopped.

Q. Which car do you mean?

A. The car that was chasing them.

Q. Now, did Johnny Ray Smith say where they went from there?

A. Yes, they came on back into Geneva County at a place down here called Hacoda, in Alabama, and they burned this stolen car, which was a late model Plymouth at the time. I don't recall the year and make.

Q. Did Johnny Ray Smith ever tell you what the effect of that shot at the car was?

A. Later on he did, he found out it was the Deputy Sheriff from Bay County, Bill Gilbert.

Q. Did he tell you that?

A. He said he found that out after he went back to Florida.

Q. Now, did Johnny Ray Smith during these interviews, did he appear to be insane?

[fol. 264] A. He did not appear to be insane.

Q. Did he ask what appeared to you to be reasonable questions?

A. Yes, sir.

Q. Did he appear to you to give alert answers and reasonable answers?

A. Yes, sir.

Your witness.

Cross-examination.

Mr. Moore:

Q. Mr. Witness, does it appear reasonable to you that a man would confess some sort of crime that had already been tried for a companion crime. You say he did shoot Gilbert in that sheriff's car?

A. Yes, sir.

Q. How many times did you talk with Johnny Ray Smith while he was in the Dothan jail?

A. Approximately four times, to the best of my recollection.

Q. When was that?

A. The first time was the day following the day he was put in jail. And then the next day, either two or three times, and then possibly again on Monday.

Q. Did you come up here to Montgomery when they brought him up here?

A. Yes; sir.

Q. Were you also present when Mr. Lill talked to him with the other two boys, Jenks and Nunn?

A. Yes, sir. I was present.

Q. Did he advise them of the Juvenile Delinquency Act? [fol. 265] A. Yes, sir. I recall that he did tell them what the juvenile delinquency Act was, which I don't remember how it was worded.

Q. When was that?

A. I am not sure whether that was on Sunday or Monday. I don't recall.

Q. Did you refresh your recollection on that point after talking with Mr. Lill since you have been here in Montgomery this time?

A. Yes, sir.

Q. Do you have any independent recollection of it now?

A. Yes, sir.

Q. Do you know what was said when it was discussed?

A. No more than he pointed out to them what the Federal Statutes consist of involving juveniles. And what a juvenile is, but I don't recall the exact wording of it.

Q. Were you with him when he told Johnny Ray Smith that Jenks and Nunn were going to plead guilty?

A. I don't recall him saying anything like that.

Q. Did Jenks and Nunn tell him that they were going to plead guilty?

A. They all three said they wanted to plead guilty.

Q. Were you in the court room when all three of them were sentenced?

A. Yes, sir.

Q. Were you called on to give any testimony before the court?

Mr. Varner: We object to that.

The Court: Objection sustained.

Q. Were you in Mr. Hartwell Davis' office prior to being carried in here?

A. Yes, sir.

[fol. 266] Q. At that time, did Mr. Lill state that he had misinformed Jenks and Nunn regarding the juvenile delinquency act, did Mr. Davis tell them that they could be tried as adults?

A. I don't recall what Mr. Lill said to them in Mr. Davis' office, but I do recall that Mr. Davis was very specific in pointing out the juvenile delinquency act, and of the particular crime that they were involved in, and that they would be handled as adults.

Q. Did Mr. Lill at that time say he had advised them that they would be handled as juvenile delinquents?

A. I don't recall whether Mr. Lill was even present at that time or not. I don't recall anything Mr. Lill said to them in Mr. Davis' office.

Q. Do you remember going over and talking to Johnny Ray Smith in the jail and telling him that Jenks and Nunn couldn't get but four years?

A. No, sir.

Q. Do you recall discussing it with him?

A. Not about what they could and couldn't get, no, sir. Because I don't know, I didn't know then.

Q. Do you know of the juvenile delinquency act being discussed with Johnny Ray Smith about those other two boys, by you, Mr. Lill, or anybody else?

A. No, sir.

That is all.

The Court: Do I understand that that is all your witnesses?

Mr. Varner: Yes, sir.

The Court: Is there any more evidence from the Movant, Mr. Moore?

Mr. Moore: Give us a half a minute, please, sir.

[fol. 267] The Court: I will give you five minutes.

Mr. Moore: Thank you, your Honor.

The United States Attorney and I have agreed to introduce the laundry slip from the Monarch Cleaners, Dothan, Alabama, showing that Johnny Ray Smith's clothes were in the cleaners on Saturday morning November 19, 1949.

The Court: It will be admitted and marked "Movant's Exhibit."

Do you have anything in rebuttal, Mr. Moore?

A. Yes, sir. One more witness.

The Court: Has this witness been sworn?

A. Yes, sir.

Oscar Smith, being called as a witness, being duly sworn, testified as follows:

Direct examination.

Mr. Moore:

Q. State your name?

A. Oscar Smith.

Q. Where do you reside?

A. In Florida.

Q. Were you incarcerated in the jail at Panama City on November 12, 1949?

A. I was.

Q. Did you see Johnny Ray Smith leave that jail?

A. I did.

Q. Tell what happened when he started to leave? Did you or did you not help him out of the window?

[fol. 268] A. The first thing, if I remember right, he was a little bit too large to go through the hole. So we soaped him down, and forced him through the hole and I think the two kids went down first. And Johnny Ray Smith, he was the last one out of the hole. And the sheet he had made a rope out of broke, maybe he was not completely out the

window, I don't think, when it broke. The rest I couldn't see.

Q. Did he come back in or go on down?

A. He went on down.

Q. Did you hear him hit?

A. No, sir. I didn't hear him hit.

Q. Was the radio going in your cell at that time?

A. Yes, sir.

Q. Loud or soft?

A. I think it was loud.

Q. Was that the last time you saw Johnny Ray Smith at that time?

A. That is the last time, yes, sir.

Q. Were you with Johnny Ray Smith on the night of July 9, 1949?

A. Yes, sir.

Q. Did he shoot anybody that night?

A. No.

Q. I will make that read on the night of July 9th or early morning, just prior to daylight on July 10th?

A. No.

That is all.

The Court: Cross-examination.

[fol. 269] Cross-examination.

Mr. Varner:

Q. Where were you and Johnny Ray Smith on the night of July 9th or early part of July 10, 1949?

A. At what particular time.

Q. Let's say all night.

Mr. Moore: If it please the Court, I would like permission to advise the witness that he is on parole, and he has the right; if there is any testimony which he might desire not to give, he has the right not to give that testimony.

The Court: He is subject to cross-examination on the matter he testified to on direct examination. Proceed.

Mr. Davis: We except.

Mr. Varner: You said you were together, where were you together?

A. Do you want me to begin at the beginning of that night?

Q. Yes. Where were you?

A. We were together in Geneva, Alabama in the early afternoon.

Q. What were you doing in Geneva?

A. I disremember.

Q. Well, you were together?

A. Yes, we were together.

Q. Where did you go from there?

A. I was carried to Samson, Alabama.

Q. By whom were you carried?

A. Johnny Ray Smith.

Q. Was anybody else with you?

[fol. 270] A. No. At that time, no.

Q. Go ahead, where did you go?

A. From there I went down to a joint, a honky-tonk named Kalamazoo, where I was once employed there; I stayed there I think a couple of hours.

Q. Did Johnny Ray Smith stay with you?

A. No, Johnny Ray went back to Geneva.

Q. Did you later see him in Geneva, that night?

A. No.

Q. Did you later see him that night?

A. Oh, yes.

Q. Where?

A. Well, I saw him back down at this joint Kallamazoo.

Q. He came back to the Kallamazoo Club?

A. He did, yes, sir.

Q. Did you leave there with him?

A. I did.

Q. By what transportation?

A. In an automobile.

Q. Whose automobile?

A. I don't know sir.

Q. What kind of automobile?

A. I think it was a Plymouth.

Q. Do you know where this automobile came from?

A. Yes.

Q. Where did it come from?

[fol. 271] A. Geneva, Alabama.

Q. Do you know whose car it was?

A. I don't know.

Q. Do you know who brought it from Geneva?

A. Well, I am positive that James Neal Driver was driving it.

Q. Was Johnny Ray Smith with him?

A. Yes.

Q. Was he with him when he left the Kalamazoo Club?

A. We all three went together.

Q. Where did you go from there?

A. We went to Ponce de Leon, Florida. Which is about 19 miles South of there on Highway 88.

Q. How far is that from Panama City?

A. Approximately 60 miles.

Q. Is that in Bay County?

A. No.

Q. Where did you go from Ponce de Leon?

A. We went down to Bay County.

Q. What did you do in Bay County?

A. We committed this robbery.

Q. What place did you rob?

A. The Edgewater Beach Apartments.

Q. And where did you go from there?

A. We went back to Alabama.

Q. Did a car pursue you there shortly after you left the Edgewater Beach?

[fol. 272] A. It did.

Q. Did the siren sound?

A. I disremember.

Q. Tell the Court the circumstances of that car being left, the circumstances of your leaving that car. They did not apprehend you at that time, did they?

A. No, sir.

Q. All right. Tell the Court how you escaped from that car that was pursuing you?

Mr. Moore: We object.

The Court: Overruled.

A. We out ran him.

Q. Did any one in your car have a firearm?

A. I had one.

Q. What kind of firearm was it?

A. It was a 45 calibre pistol.

Q. Did you have it in your possession the whole time?
A. I did.
Q. You had it in your possession?
A. In my possession.
Q. Was there any other firearms in that car?
A. No other firearms.
Q. Did you, or anyone, shoot that firearm or discharge it in anyway. At that time when that car was pursuing you?
A. Your Honor, I can——
[fol. 273] The Court: Answer the question.
A. Yes.
Q. Who fired this firearm?
A. I disremember.

Mr. Davis: Your Honor, it is obvious that he remembers it; and I ask you to instruct him to answer the question.
The Court: Was a firearm fired?

A. Yes, sir.
Q. Who fired it?
A. Do I have to incriminate myself?

The Court: It is the judgment of The Court that this witness is not worthy of belief. His testimony will not be considered. You may be excused. Next witness.
Mr. Moore: We have no further testimony to offer.
The Court: Do you have any?
Mr. Varner: We have nothing further.
The Court: The issues which have heretofore been determined as reflected by the pleadings, and as reflected by our conversation, which you all have been advised, can in my judgment be argued jointly. I see no reason for arguing them separately. And, unless you have an objection to it, I suggest that you argue it jointly. How much time do you wish for your argument?
Mr. Varner: I think fifteen or twenty minutes to the side would be ample.
The Court: We will have the argument in the morning at 9:00 o'clock. Mr. Moore, you determine in the meantime how much you are going to ask for. I reserve the right to determine how much is necessary but, if at all possible [fol. 274] I want to give you what is necessary.

Mr. Moore: May it please your Honor, the Movant would like to be present at that time.

The Court: He will be here. The witnesses that were subpoenaed here, or the witnesses who have come without subpoena will be discharged, with the exception of those who came on habeas corpus writ and they will be returned to the person that brought them here under the writ.

Mr. Varner: There may be something in the record about this hospital record. I think after we have decided, Mr. Moore.

The Court: I won't foreclose you from introducing any records that you agreed on that may be pertinent in the morning prior to argument.

The Court wants the records tonight, you have had them all the time and I want to study it now.

Mr. Davis: If your Honor please, I would like to read into the record in case it hasn't been done. The agreement between counsel, and I understand between the Movant, and the Government: That the record in regard to Johnny Ray Smith from Alcatraz and those from Atlanta, which was received in regard to his health, and those should be substituted by photostats for the original records.

The Court: That will be granted. Mr. Moore, the medical records that were forwarded here from Alcatraz have, according to my recollection, not been introduced in evidence. Do you desire to offer them?

Mr. Moore: I beg of The Court at this time to let me put on the stand one of the people who came over here from Atlanta. Mr. Varner told me about an hour ago he was not going to use him and it had slipped my mind that they [fol. 275] were here.

The Court: Mr. Moore, you have that right, go ahead. We want all the testimony that is pertinent in this thing.

Dr. Claude E. Christmas, being called as a witness, being duly sworn, testified as follows:

Direct examination.

Mr. Moore:

Q. State your name, please sir.

A. Claude E. Christmas.

Q. Medical and Technical Assistant.

What does that mean.

A. That is a supervisory capacity, of nursing and property, etc.

Q. As part of your duties do you receive the prisoners in Atlanta?

A. One of us goes over just for a cursory examination when they come in.

Q. What is the nature of that?

A. Well, it is just for missing limbs, lice, etc.

Q. I hand you herewith, for the purpose of examination, a record which I believe bears your signature, is that correct?

A. Right.

Q. That is your signature?

A. Correct.

Q. And you made that record?

A. That is right.

Q. When did you make that record?

A. On this date, 2:25 PM.

[fol. 276] Q. Is this the regular cursory examination which you told of?

A. Correct.

Q. Do you examine patients at all?

A. We ask them questions. This statement here, 1. 2. 3 of this statement. We ask them if they have serious injuries and things of that nature.

Q. Did you examine Johnny Ray Smith when he came in?

A. I just went over this cursory examination and asked him here.

Q. You are no- a medical doctor are you?

A. No, I not a M.D.

Q. Then you couldn't examine him from a medical aspect, could you?

A. No, I am not an M.D.

Q. In other words you just fill out this form, is that correct?

A. Yes, I fill out this form.

Q. Then do they receive a medical examination after that?

A. Yes, sir, they do.

Q. How long after that, would you say?

A. According to this date, he came in there on a Monday or Tuesday. He got a physical on Thursday.

Q. And if he had need of emergency aid in the meantime.

A. I would have taken him over, myself. I would have called it to the attention of the Doctor to him myself.

Q. I hand you herewith a card, "Out-Patient Sick Card," and ask you to examine it. Is that the type card you were using in the institution at the time?

A. Right.

Q. Can you help me out and read that top line, please.

[fol. 277] A. Well, I can't read it.

Q. When is a card of that kind made?

A. That card is made upon his entrance. As soon as we get the transfer sheet. The daily transfer sheet.

Q. Which might be two or three days after he had entered?

A. No, perhaps the next day. This card is made from that.

Q. If he received aid or examination or any type of treatment, from the time he came into the institution and you made your cursory examination, up until the time of his regular physical examination, is any records made on it?

A. Yes, it should have been on this card, yes, sir.

Q. If that card had been——

A. If he had been taken over to the hospital, his card would have been pulled.

Q. If no card had been prepared at that time?

A. There should have been one prepared. If he came in the afternoon, the next morning the transfer sheet would have picked him up. That card would have been made and filed in a hospital file there, in the card file.

Q. Now, in the event that they had gone over this patient and he had been given whirl-pool bath treatments and drugs, routine drugs, would there have been a record of that?

A. It should have been made before he got the treatments, on his card.

Q. If he got it before the card was made they wouldn't necessarily have made one at the hospital for him?

A. Oh, yes. That is the procedure, there is not one we don't make a card for.

[fol. 278] Q. You can't answer for this particular prisoner that there was a card made at that time?

A. No, but I would take it for granted that one was made, because we don't have to make any very seldom. We lose a lot of cards, if we don't have a card we make another one there before he gets treatment on the line or to see a Doctor.

Q. Who was the Chief Medical Officer there, at that time?

A. Dr. Hess now deceased.

Q. If this particular patient had been examined by Dr. Hess, and given treatment, I take it, from what you have just said, if a card was made that possibly that card might have been lost, is that correct?

A. It was possibly lost or torn up. We have a lot of them that are lost and torn up.

That is all. We would like to put this card in evidence.

The Court: All right. Any Cross-examination?

Cross-examination.

Mr. Varner:

Q. I would like to ask one question. This statement, labelled "Preliminary Physical Examination" Is that the statement that you were referring to a while ago, when you stated that the first three answers there were his statements?

A. Right.

Q. You asked him the questions and you put down his answer, is that correct?

A. Right.

[fol. 279] Q. And if he was injured you put down the answer "Yes." Do you fill out there what that injury is? anywhere?

A. Right. If the injury is to the right leg, a fracture of the right leg or right ankle we put it down there.

Q. But this card shows that he had *no injury*, and that card is dated November 22, 1949. Was that card made out when he entered the federal penal institution in Atlanta?

A. Yes.

Q. And his statement was that he had no injuries?

A. Right.

Q. Is there anywhere on that card that you state whether or not a man is sick at the time he is brought in?

A. No. It comes under this, if they say he might have a temperature, we take the temperature. Also at the same time we took the blood pressure.

Q. Did you take his temperature?

A. No temperature. His temperature was normal, and his blood pressure was normal.

The Court: The card will be admitted and marked "Movant's Exhibit.

Mr. Moore: Mr. Christmas, I ask you if you remember this man when he came in your institution?

A. I would say his face, yes, but I could not call him by name.

Q. Do you remember anything about his physical condition at all?

A. I don't know anything about his physical condition other than the statement that is there, when I saw him at the examination.

That is all.

[fol. 280] Mr. Varner: Would you state what you said again?

A. I said I don't know anything about his physical condition other than what he stated there when I saw him at examination.

Mr. Varner: We would like to offer this card in evidence.

Mr. Moore: Your Honor, we object to the introduction of that card, since it, with December 16.

The Court: It was my understanding that you offered the card in evidence Mr. Moore.

Mr. Moore: I thought you offered it in evidence and I was admitting it as your exhibit. Are you offering it.

A. No, sir.

The Court: All right, the card will not be admitted, it is not offered in evidence. All right, Gentlemen, I will hear your arguments in the morning at 9:00 o'clock.

Next morning, December 21, 1955.

The Court: All right, we will hear your arguments.

Mr. Varner: Argues to the Court.

Mr. Moore: Argues to the Court.

The Court: Mr. Moore, at this time, I would like to state for the record, that since you have served on this case, by virtue of the Court's appointment, since you served without any compensation, since The Court knows that you have spent considerable amount of time, even days, investigating this case, to the extent of going in South Alabama and Northern Florida, investigating and interrogating witnesses at your own expense, that in my [fols. 281-282] judgment your actions and your attitude are commendable and I want to express my appreciation to you for your conscientiousness, that your actions your attitude and the mind in which you have represented this man without compensation reflects not only credit upon you as an attorney and member of the bar but upon the Bar Association. I thank you.

The Court will reserve judgment in this case. I will make a detailed findings of fact and conclusions of law, that will be filed with the Clerk, and each of you will be furnished a copy.

Mr. Moore——

The Court: Mr. Smith will be returned to the designated place of incarceration by the Marshall, where the Attorney General designates, the Court has no control of that.

Court is adjourned.

[fols. 283-285] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 286] IN UNITED STATES COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT

JOHNNY RAY SMITH, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

CAPTION

Be It Remembered, That heretofore, to-wit, on the 27th day of May, A. D., 1957, a transcript of the record in the above styled cause, pursuant to an appeal from the United States District Court for the Middle District of Alabama, was filed in the office of the Clerk of the said United States Court of Appeals for the Fifth Circuit which said transcript was filed and docketed in said Court of Appeals as No. 16708, as follows, to-wit:—

[fol. 287] IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The President of the United States of America

To the Honorable the Judge of the United States District Court for the Middle District of Alabama, Greeting:

Whereas, lately in the United States District Court for the Middle District of Alabama, before you, in a cause between Johnny Ray Smith, petitioner, and United States of America, respondent, No. 1137-N Civil, wherein the judgment of the District Court entered in said cause on the 10th day of January, A.D., 1956, was in favor of respondent, United States of America, and against plaintiff, Johnny Ray Smith, as by the inspection of the transcript of record of the said District Court, which was brought into the United States Court of Appeals for the Fifth Circuit, by virtue of an appeal sued out by Johnny Ray Smith, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and fifty-six,

the said cause came on to be heard before the said United States Court of Appeals, on the said transcript of record, and was argued by counsel:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to grant the motion, to set aside the conviction and sentence, and to proceed further and not inconsistently with the opinion of this Court.

November 27, 1956.

"Rives, Circuit Judge, concurring in part and dissenting in part."

ORDER ON PETITION FOR REHEARING

Extract from the Minutes of February 1, 1957.

It is ordered by the Court that the last paragraph of the opinion rendered on November 27, 1956 in the above [fol. 288] entitled and numbered cause be, amended to read:

> "The judgment is reversed and the cause is remanded with directions to set aside the conviction and sentence and to proceed further and not inconsistently herewith, including, if the district judge is of the opinion that the ends of justice require it, permitting the defendant to withdraw his waiver of counsel and his plea of guilty and to stand trial."

The opinion having been so amended, the petition for rehearing in this cause be, and the same is hereby, denied.

"Rives, Circuit Judge, dissenting."

You Therefore, Are Hereby Commanded that such execution and further proceedings be had in said cause as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the 28th day of February —, in the

year of our Lord one thousand nine hundred and fifty-seven.

Edward W. Wadsworth, Clerk, U. S. Court of Appeals for the Fifth Circuit.

[Endorsed:] No. 16068, United States Court of Appeals for the Fifth Circuit, October Term, 1956; Johnny Ray Smith, Appellant, vs. United States of America, Appellee. Mandate. Filed March 4, 1957. R. C. Dobson, Clerk. By S, Deputy Clerk.

[fol. 289] In the United States District Court for the Middle District of Alabama, Northern Division.

No. 1605-S

Johnny Ray Smith,

v.

United States of America

Notice of Appeal—Filed April 5, 1957

Notice is hereby given that Johnny Ray Smith, the movant above-named, hereby appeals to the Court of Appeals for the Fifth Circuit from that final judgment entered in this action on the 29th day of March, 1957, in favor of the plaintiff, United States of America, and against the movant, Johnny Ray Smith.

Done this 5 day of April, 1957.

Rushton, Stakely & Johnston, by William B. Moore, Jr., Attorneys for Movant.

Rushton, Stakely & Johnston, 1201 Bell Building, Montgomery, Alabama.

Certificate of service (omitted in printing).

[File endorsement omitted.]

[fol. 290] IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

C.A. No. 1137-N

Filed April 8, 1957.

UNITED STATES OF AMERICA,

vs.

JOHNNY RAY SMITH

TRANSCRIPT OF HEARING—March 29, 1957

The Court: Let the record reflect that Mr. William Moore, Attorney, and Johnny Ray Smith are here in the Court Room at this time. Now, Gentlemen, I must, as directed by the United States Court of Appeals for the Fifth Circuit, in its mandate to this Court dated February 28, 1957, in Civil Action No. 1137-N styled Johnny Ray Smith, petitioner, versus United States of America, respondent, order, and I do hereby order and adjudge, and it is hereby the judgment of this Court, that the conviction and sentence pronounced upon your plea of guilty, Mr. Smith, in Criminal Action 1605-S, by the Honorable Charles B. Kennamer, on November 21, 1949, be and the same is hereby set aside.

Mr. Moore: May the Court please, I would at this time like to file with the Clerk a petition for a writ of habeas corpus and hereby serve a copy on the United States District Attorney.

The Court: Let me see it, Mr. Clerk, will you mark it.

Mr. Moore: May it please the Court, my intentions were——

The Court: I am not talking about what your intentions were, I am talking about the status of this particular case, the conviction and sentence being set aside.

Mr. Moore: I was not talking about my future intentions, I was trying to say what I thought the status of the case is.

The Court: All right, fine.

Mr. Moore: It was our intention and I intend to argue if the Judge will give me the opportunity, the paper now before the Court when he has a hearing on the habeas

corpus. We contend that the prisoner should be released under the Fifth Circuit's order, so, therefore, I have to say my contentions, because I can't say——

[fol. 291] The Court: Do you want to take some evidence in support of this particular writ of habeas corpus?

Mr. Moore: I just merely want to be heard on it, Your Honor.

The Court: All right, I will hear you at this time.

Mr. Moore: As I understand it the Judge has now produced the prisoner, based on our observations, as of this moment?

The Court: That is right.

Mr. Moore: And now, you will hear me on my habeas corpus motion, which I have just filed?

The Court: That is right.

Mr. Moore: May it please this Honorable Court, we feel that on November 27, 1956, the United States Court of Appeals for the Fifth Circuit, filed and finally rendered a mandate on February 28, 1957. In that mandate, an opinion rendered, which I have referred to above, as being an opinion of November 27, 1955, is incorporated into that mandate, and that original opinion was modified in only one respect, that being that the phraseology of the judgment reversed the cause in the mandate, etc., is the only change, therefore, the point I am trying to make at this time in my remarks will be directed to the opinion rendered by the Court, and which is a part of the mandate in the opinion rendered November 27, 1955.

Upon Page 10, of the copy, which is an actual copy attached to the mandate, so therefore, it is a part of the mandate, it is the contention of this party, and I read from the decision:

> "When it comes to the controlling question, however, which the motion presents, whether under the undisputed facts the defendant was denied due process in the taking of his waivers and plea, the matter stands quite differently, and because it is clear that it was not accorded him, the judgment must be reversed."

Our position is that the Court has ruled that due process was denied the defendant in the taking of his waiver and the taking of his plea, and therefore under the findings of

this Court, this Judge, this Honorable Court here, has been [fol. 292] directed to set aside all those procedures, wherefore——

The Court: I have only been directed to set aside the conviction and sentence.

Mr. Moore: That is in the final paragraph, your Honor.

The Court: All right.

Mr. Moore: Again, to go back to the words of the Court: "Due process has been denied" and that his waivers and plea must be set aside, and the judgment must be reversed as due process was not accorded to him.

I am sure the Court has a copy.

The Court: I have it before me.

Mr. Moore: Therefore, if due process was denied, which is what this entire opinion holds, and the waiver and plea are no good and must be set aside, then this defendant's writ of habeas corpus should be honored and he should be freed forthwith.

The Court: Is there anything else?

Mr. Moore: No, sir, not at this time.

The Court: I have permitted you to file this affidavit of writ of habeas corpus. The Court declines to issue the writ of habeas corpus, and declines to grant the order to discharge this man from detention and restraint. Now, I understand you have another motion to file; relief is denied as far as habeas corpus is concerned. File your motion with the Clerk.

Mr. Moore: We would like to file a motion to withdraw the plea of guilty and be heard again.

The Court: All right.

Mr. Moore: I hand herewith to Mr. Hartwell Davis, a copy.

The Court: I will hear it at this time.

Mr. Moore: Under rule 32 dealing with Criminal Procedure it is our contention that any time prior to sentence the Court may set aside a plea of guilty. We contend that the evidence which the Court has had on previous occasion, that the man was not fully advised of his rights, [fol. 293] and the Court has so found according to our contentions, in the Fifth Circuit's opinion, therefore, if any plea exists, which we deny, but in the event that it did, we respectfully request this Court to set that aside and

specifically maintain in our motion that we do not recognize any waiver of indictment and we still insist that it is a valid order.

The Court: It is the opinion of the Court that the ends of justice do not require the permitting of this defendant to withdraw his plea of guilty entered in the case in open court on November 21, 1949. I used the term, "ends of justice" because that is the term the Court of Appeals used in its mandate to me. I have studied the case, I have studied the records both in the civil case and the criminal case, I have spent considerable time considering the proceedings. Your motion to withdraw the plea of guilty is over-ruled and denied.

Mr. Moore: May it please the Court, I respectfully request to file our motion for withdrawal of waiver of venue, waiver of indictment and waiver of counsel. And hand herewith a copy to the United States Attorney. Our contention on that is that under the ruling of the Fifth Circuit Court of Appeals, all those waivers were set aside by the Court and it has had the honorable Court's permission to make such election and we respectfully request that such election be exercised. We, therefore, point out to the Court that justice was denied to this man in the taking of those wavers. We feel that the way this decision was first stated, the way it came out——

The Court: Prior to the time the Government made an application for a re-hearing, and prior to the time the Court issued its amended mandate?

Mr. Moore: Yes, sir, that this prisoner should have been discharged. If that is true, then when it came out amended it is still reversed and remanded, and that part of it stood, and the only option this Court has to either discharge the prisoner or to follow the second paragraph down there, and [fol. 294] to give him a new trial.

The Court: I cannot say what option the Court of Appeals felt it had, but the option that this Court has, as I read it, and I am reading the order of the Fifth Circuit on the Government's petition for a re-hearing as filed in the Minutes of February 1, 1957, it says:

> "It is ordered by the Court that the last paragraph of the opinion rendered on November 27, 1956, in the

above entitled and numbered cause be, amended to read:

"The judgment is reversed and the cause is remanded with directions to set aside the conviction and sentence and to proceed further and not inconsistently herewith, including, if the district judge is of the opinion that the ends of justice require it, permitting the defendant to withdraw his waiver of counsel and his plea of guilty and to stand trial."

Mr. Moore: May it please the Court, the re-wording of the last paragraph, and the last four lines, down to "herewith" is verbatim with the original judgment and with their original opinion, therefore, we contend that if the Court chose to put a period there, then this man could be released.

The Court: I do not put periods where the Fifth Circuit Court of Appeals put a comma.

Mr. Moore: I think the Court has an alternate to stop there, and if it does stop there then the prisoner is entitled to be released. If the Court desires to exercise its alternate, as set out in the second part, then the only alternate it has is to permit the waiver of counsel and plea of guilty and stand trial.

The Court: Your motion to withdraw waiver of venue, and waiver of indictment, and waiver of counsel, is denied and is over-ruled and denied.

Q. Mr. Smith, or Mr. Moore, do you have anything to state at this time, other than what you have said and what you have said in your motion, that you consider to be in [fol. 295] mitigation of punishment or explanation of this offence that a plea of guilty was entered into by the defendant on November 21, 1949?

A. No, sir.

Q. Or do either of you know of any reason other than what you have said in the motions, and what you have said here today in open court, why sentence should not be pronounced here at this time?

Mr. Moore: May it please the Honorable Court, we would like to contend that the imposition of another sentence would constitute double jeopardy.

The Court: Do you make that in response to my question as to why sentence should not be imposed at this time?

A. Yes, sir.

Q. If you make that in the form of a motion, the motion is over-ruled and denied. If you make that in the form of a plea, then the plea is over-ruled and denied. I want to inquire of you, Mr. Smith, prior to the time I sentence you, and it is not necessary that you answer the questions. If you would like to answer them, I am going to give you an opportunity to do so. This is in regard to your previous criminal record, were you convicted in the U. S. Federal Court in Texas, for violation of what is popularly known as Dyer Act, that is theft of a motor vehicle in 1941?

A. Yes, sir, that is correct.

Q. And I understand that you were in the army at that time?

A. Yes, sir.

Q. And the judge put you on five years probation?

A. Yes, sir.

Q. And shortly thereafter you got in trouble again with an M. P. and the probation was revoked and you were sentenced to 18 months?

A. That is correct.

[fol. 296] Q. Do you have any statement you choose to make to me at this time, regarding that sentence, that conviction and sentence?

A. No, that was just the first trouble I was ever in, I was just a kid, seventeen at the time, I was just wild, that was all.

Q. I want to ask you if your were convicted in U. S. District Court in Gainsville, Florida, in 1944, January, 1944, for a similar offense.

A. That was; the Dyer Act, yes, sir.

Q. Do you have any statement or explanation that you wish to make to the Court regarding that conviction?

A. No, sir.

Q. The records before me indicate that you escaped from Tallahassee, Florida, prison, in February 1944; that was part of the events leading up to this case, is that correct?

A. No, sir. That was in 1944, and it was a Federal of-

fense, the Dyer Act, I was two years at Gainsville, Florida, that was when I was sent to the Corrections Institution in January 17, 1944, it had nothing to do with this case. This case did not begin until 1949.

Q. Did you escape from custody?

A. Yes, sir. I actually ran off.

Q. And were you convicted for this and given two years sentence?

A. Yes, sir. Two years and I had two years for the car.

Q. Did that make your third car case?

A. Yes, sir.

Q. Now, let me ask you about this armed robbery in 1949, that is part of the events immediately preceded this case now before this Court?

A. Yes, sir.

[fol. 297] A. Yes, sir, that is right. There is a 45-year sentence outstanding in that matter at this time.

Q. Is there an appeal pending in that case?

A. There was, I don't know whether it still is or not. I have not heard from it since 1949. I intend to hold further litigation in the case if it becomes necessary.

Q. Is there anything further that either of you wish to state to the Court prior to the time sentence is imposed on you in your plea of guilty entered before Judge Kennamer in this case on November 21, 1949?

Mr. Moore: I can think of nothing further.

The Court: I recite this for the record and for whatever benefit it might be to you Mr. Smith and for whatever information—This Court in making an effort to determine what a fair sentence should be on this plea of guilty, has taken into consideration the fact that you have been in the custody of the Attorney General upon this conviction and sentence that I have just set aside, that is the one imposed upon you by Judge Kennamer for almost eight years, is that correct?

A. Yes, sir.

Q. Now, in arriving at the sentence, that I am now going to impose I am giving you credit for that time that you have served, that eight years. However, it is my judgment, and is my opinion that the ends of justice require

that you be sentenced to the custody of the Attorney General for some substantial period in addition to the time you have served. It is, therefore, the Order and Judgment of the Court that you be committed to the custody of the Attorney General for ten (10) years, to stand committed this date.

You will be in the hands of the U. S. Marshal.

Mr. Moore: May it please the Court, I would like permission to re-file this writ of habeas corpus and make the same arguments which I won't repeat to the Court.

[fol. 298] The Court: What is the purpose of that. Do you wish to re-file the petition for a writ of habeas corpus or just be heard on it, you do not wish a ruling on it?

A. I do not expect a ruling on it.

The Court: All right, you may re-file it, and I will rule on it sometime within the next few days.

Mr. Moore: I would further, at this time, move this Court to stay execution of this sentence or this judgment and sentence, pending appeal.

The Court: I will not.

Mr. Moore: I would request the Court that this man be allowed to stay here long enough for me to prepare the proper papers, which he will have to sign, requesting appeal in forma pauperis, and other necessary papers to instigate an appeal.

The Court: That is a matter that you will have to take up with the U. S. Marshal, it stands in the hands of the Marshal.

Mr. Moore: We will be allowed sufficient time to——

The Court: You will have to take that up with the U.S. Marshal, I have no control over it.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 299] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

No. 1605-S

JOHNNY RAY SMITH,

vs.

UNITED STATES OF AMERICA

MEMORANDUM OPINION AND ORDER—July 10, 1957

This cause is presented to the Court upon the motion of Johnny Ray Smith received by the Court on July 8, 1957; said motion seeks to have this Court stay judgment and sentence that was pronounced and imposed by this Court upon Smith on the 29th day of March, 1957; said motion also seeks to have this Court fix a reasonable bond for Smith and also order his removal from the Alcatraz Penitentiary "to a jail or other place of confinement within the immediate vicinity . . . of this Honorable Court."

A brief history of the proceedings resulting in Smith's being incarcerated in Alcatraz Penitentiary is considered appropriate and necessary upon a consideration of this combination motion made by Smith, pursuant to Rule 38(a)(2) and Rule 38(b) of the Federal Rules of Criminal Procedure.

On November 21, 1949, movant Smith appeared before this Court upon a charge of kidnaping; said charge was laid under § 1201(a), Title 18 of the United States Code. After entering a plea of guilty in open court, Smith was sentenced and committed to the custody of the Attorney General, or his authorized representative, for a period of thirty years to stand committed that date. Subsequently, Smith filed a motion as provided for by § 2255, Title 28 of the United States Code. This motion sought relief from this sentence upon various grounds, all alleging a denial of his constitutional rights. This Court declined to entertain this motion, an appeal was taken, and the Court of Appeals for this Circuit reversed the action of this District Court and re-

manded the cause for hearing on the merits. See *Johnny Ray Smith v. United States*, 223 F.2d 750 (June 21, 1955).

Beginning on December 19, 1955, after the appropriate authorities were directed to produce Smith before this Court (from Alcatraz Penitentiary to Montgomery, Alabama), a full and complete hearing was conducted with [fol. 300] Smith's being represented by court-appointed counsel and Smith's witnesses, by virtue of an order of this Court, appearing in his behalf at the expense of the Government. This Court on January 10, 1956, after considering the testimony and various exhibits, made and entered findings of facts and conclusions of law. This Court found there had been no "manifest injustice" in Smith's case; that his sentence was not in violation of due process of law; and that all of his constitutional rights had been adequately protected. This Court on the same date entered judgment denying Smith's motion.

Again Smith appealed, this Court permitting it upon motion by Smith in forma pauperis, and the Circuit Court of Appeals for this Circuit held, among other things:

> "When it comes to the controlling question, however, which the motion presents, whether under the undisputed facts the defendant was denied due process in the taking of his waivers and plea, the matter stands quite differently, and because it is clear that it was not accorded to him, the judgment must be reversed.
>
> "This is so, because, considering the inordinate speed, the incontinent haste, with which the defendants were brought up for hearing and the trial moved on apace, the fact that the government prosecuting agent and the district judge, before the defendant had made any waivers or pleaded in the cause, conferred privately in chambers with the prosecuting agent with regard to defendants' guilt and the punishment to be imposed therefor, in connection with both what was said and done and what was left unsaid and undone by the judge in taking the waivers and the plea and sentencing the defendant, we are left in no doubt that the movant was not accorded, but was denied, due process, and that the judgment against, and sentence imposed upon him may not stand."

See *Johnny Ray Smith* v. *United States*, 238 F. 2d 925 (November 27, 1956).

Upon an application for rehearing made by the United States, the original opinion was amended as follows:

> "The judgment is reversed and the cause is remanded with directions to set aside the conviction and sentence and to proceed further and not inconsistently herewith, including, if the district judge is of the opinion that the ends of justice require it, permitting the defendant to withdraw his waiver of counsel and his plea of guilty and to stand trial."

The mandate of the Circuit Court of Appeals, dated February 28, 1957, directed this Court as follows:

> "The judgment is reversed and the cause is remanded with directions to set aside the conviction and sentence and to proceed further and not inconsistently herewith, including, if the district judge is of the opinion that the ends of justice require it, permitting the defendant to withdraw his waiver of counsel and his plea of guilty and to stand trial."

[fol. 301] As directed by the Circuit Court of Appeals, this Court again by appropriate order had Smith returned from Alcatraz Penitentiary to Montgomery, Alabama. Thereupon, on March 29, 1957, as directed, the judgment of this Court pronounced on November 21, 1949, was set aside. At that time, in open court, this Court recited:

> "It is the opinion of the Court that the ends of justice do not require the permitting of this defendant to withdraw his plea of guilty entered in the case in open court on November 21, 1949. I used the term, 'ends of justice' because that is the term the Court of Appeals used in its mandate to me. I have studied the case, I have studied the records both in the civil case and the criminal case; I have spent considerable time considering the proceedings. Your motion to withdraw the plea of guilty is overruled and denied."

Following that and after determining from Smith by appropriate questions in open court that he had several prior

felony convictions, including one armed robbery, the Court stated:

> "Now in arriving at the sentence that I am now going to impose I am giving you credit for that time that you have served, that eight years. However, it is my judgment, and is my opinion that the ends of justice require that you be sentenced to the custody of the Attorney General for some substantial period in addition to the time you have served. It is, therefore, the order and judgment of the Court that you be committed to the custody of the Attorney General for a period of ten (10) years, to stand committed this date."

This judgment and commitment was entered on March 29, 1957.

On April 5, 1957, Smith, through his court-appointed attorney, filed notice of appeal and also a motion and affidavit seeking to appeal in forma pauperis at the expense of the government. On April 8, 1957, this Court denied the motion of Smith to appeal in forma pauperis, stating: "No substantial question having been presented by this Court's action of March 29, 1957, and it appearing that said appeal is not taken in good faith . . ."

On May 9, 1957, Smith again filed notice of appeal from the action and judgment of this Court on March 29, 1957. This notice recited that the appeal was in forma pauperis and was granted by the Fifth Circuit Court of Appeals. A certified copy of that order to that effect was also filed with the Clerk of this Court.

A study of the entire case reflects that the only matter reviewable on the appeal now pending is whether or not this Court followed the mandate of the Circuit Court of Appeals. It is so obvious that the mandate was followed, and the record clearly reflects that it was, that this Court is still of the opinion that the appeal is frivolous and that no substantial question is presented for review. This Court [fol. 302] is of the opinion that the entire matter has been, for the time being, taken out of the hands of this Court by the action of the Circuit Court of Appeals in allowing this

appeal in forma pauperis after the same motion was denied by this Court.

Relief is therefore denied on the motion to stay judgment, to set bail, and to order movant's removal from the Alcatraz Penitentiary to the vicinity of this Court. In any event, it is felt that this Court could not, feeling that the appeal is frivolous, allow bail in this case. See Rule 46(a)(2). The Court further feels that the circumstances, as herein outlined, require a motion such as is now presented be presented to the Circuit Court of Appeals for the Fifth Circuit Procedure.

The Clerk of this Court is directed to file a copy of this memorandum opinion and order, together with a copy of the motion, and is also directed to forward a copy of this memorandum opinion and order to the movant, Johnny Ray Smith, at Alcatraz Penitentiary.

Done, this the 10th day of July, 1957.

Frank M. Johnson, Jr., United States District Judge.

[fol. 303] In United States Court of Appeals for the Fifth Circuit

Minute Entry of Argument and Submission—October 15, 1957 (omitted in printing)

[fol. 304] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16708

JOHNNY RAY SMITH, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Middle District of Alabama.

Before Rives, Jones and Brown, Circuit Judges

OPINION—(November 21, 1957.)

Per Curiam: Here twice before under a Section 2255 (28 USCA 2255) proceeding, *Smith v. United States*, 5 Cir., 223 F.2d 750; *Smith v. United States*, 5 Cir., 238 F. 2d 925, rehearing 240 F.2d 347, Smith, by this third appeal, presents for the first time an appeal[1] from the [fol. 305] criminal conviction and sentence entered after our last remand.

On the hearing, the District Court set aside the sentence of conviction adjudging a thirty-year prison term and then imposed a sentence of ten years. But the Court denied the successive motions made by Smith to withdraw his (a) plea of guilty, (b) waiver of venue, (c) waiver of counsel and (d) waiver of indictment.

---

[1] As a precautionary measure fully to preserve the points, Smith's able court-appointed counsel, simultaneous with the hearing below, filed a petition for habeas corpus. This is also an appeal from the denial of that writ. Additionally, Smith requests that we treat the main appeal as an alternative application for writ of mandamus to compel the District Judge to comply with our mandate.

[2] Smith, recognizing that the Court, 238 F.2d 925 at 929, with Judge Rives dissenting, pages 931-934, has expressly ruled adversely to his contentions, presents it again merely to preserve the point for possible certiorari review.

By suitable language in the opinion itself and by similar precise terms in the mandate, we sought on rehearing,* 240 F.2d 347, to make plain that the sentence of conviction of thirty-years imprisonment was alone mandatorily to be set aside, and that as to the plea of guilty and waivers, the District Court was free to allow such of these as the interests of justice might require. The District Court, finding expressly that the interests of justice did not so require, paid scrupulous heed to, and carried out, [fol. 306] the precise terms of our mandate. Whether the interests of justice required further action was of the very nature calling for the exercise of the highest order of reasoned judicial discretion. Nowhere does Smith succeed in demonstrating that this conclusion lacks substantial basis.

All relief sought must therefore be denied; the judgment appealed from is affirmed, the denial of application for habeas corpus is affirmed and the alternative writ of mandamus is denied.

Affirmed and Denied.

RIVES, Circuit Judge, Dissenting:

I think that the offense charged in the information might be punished by death, and that the information did not confer jurisdiction on the Court for the reasons stated in my dissenting opinion in *Smith* v. *United States*, 238 F. 2d 925, 931, et seq. Assuming jurisdiction, as ruled by the major-

---

* Our opinion on rehearing stated 240 F.2d 347:

"Further, while we are not convinced that the last sentence in the opinion, which counsel refer to as 'the remanding order of the court', needs clarifying; in deference to their view that it does, the last paragraph of the opinion is amended to read:

> "'The judgment is reversed and the cause is remanded with directions to set aside the conviction and sentence and to proceed further and not inconsistently herewith, including, if the district judge is of the opinion that the ends of justice require it, permitting the defendant to withdraw his waiver of counsel and his plea of guilty and to stand trial.'"

ity, I had thought, and still think, that the earlier judgment of conviction should have been affirmed, and that the reasons for reversal assigned by the majority were not sound, 240 F. 2d 347, et seq.

As I understand, the majority held that the defendant was denied due process in the taking of waivers and plea and the imposition of sentence.[1] Nevertheless, the last [fol. 307] paragraph of the opinion was amended to read as set forth in the margin.[2]

If in the taking of the plea of guilty the defendant was denied due process, as this Court's opinion stated, then necessarily, it seems to me, the district judge had no discretion to entertain an opinion that the ends of justice

---

[1] "When it comes to the controlling question, however, which the motion presents, whether under the undisputed facts the defendant was denied due process in the taking of waivers and plea, and the imposition of sentence the matter stands quite differently, and because it is clear that it was not accorded to him, the judgment appealed from must be reversed.

"This is so, because, considering the inordinate speed, the incontinent haste, with which the defendants were brought up for hearing and the trial moved on apace, the fact that the government prosecuting agent and the district judge, before the defendant had made any waivers or pleaded in the cause, conferred privately in chambers with regard to defendants' guilt and the punishment to be imposed therefor, in connection with both what was said and done and what was left unsaid and undone by the judge in taking the waivers and the plea and sentencing the defendant, we are left in no doubt that the movant was not accorded, but was denied, due process, and that the judgment against, and sentence imposed upon him may not stand." Smith v. United States, 5th Cir. 1956, 238 F. 2d 925, 930.

[2] "'The judgment is reversed and the cause is remanded with directions to set aside the conviction and sentence and to proceed further and not inconsistently herewith, including, if the district judge is of the opinion that the ends of justice require it, permitting the defendant to withdraw his waiver of counsel and his plea of guilty and to stand trial.'" Smith v. United States, 5th Cir. 1957, 240 F. 2d. 347.

permitted him to decline the defendant's request to withdraw such plea. The district court was directed to proceed "not inconsistently *herewith*," meaning with the majority opinion of this Court. Yet the district court refused the defendant permission to withdraw a plea of guilty which the majority of this Court in that opinion held was taken without due process of law. That is beyond my comprehension.

Further, it is deceptive and a sheer formality to set aside a judgment of conviction and at the same time hold [fol. 508] valid the plea of guilty upon which that judgment was based. The two are inseparable. The setting aside of the judgment of conviction necessarily required the vacation of the plea of guilty.[2] Upon each of the foregoing grounds, I respectfully dissent.

---

[2] "A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence." Kercheval v. United States, 274 U.S. 220, 223.

"His plea, therefore, is not a mere admission of guilt or extra-judicial confession of guilt; it is, itself, a conviction, and as conclusive as the verdict of a jury." Joyner v. Parkinson, 7th Cir. 1955, 227 F.2d 505, 508.

"Appellant's voluntary and deliberate plea of guilty to the charge was a confession of guilt, and constituted a waiver of his right to a jury trial and a consent to the imposition of any sentence authorized by law." Donnelly v. United States, 10th Cir. 1950, 185 F. 2d 559, 560.

See also concurring opinion of Chief Judge Hutcheson in Shelton v. United States, 5th Cir. 1957, 246 F. 2d 571 at p. 574.

[fol. 309] IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16708

JOHNNY RAY SMITH,

versus

UNITED STATES OF AMERICA

MINUTE ENTRY OF JUDGMENT—November 21, 1957

This cause came on to be heard on the petition filed by appellant for a writ of mandamus, and on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause and the denial of application for habeas corpus be, and the same are hereby, affirmed and that the alternative writ of mandamus be, and it is hereby, denied.

"RIVES, Circuit Judge, dissenting."

[fol. 310] IN UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

CLERK'S CERTIFICATE

I, Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 19 to 47, next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 16708, wherein Johnny Ray Smith, is appellant and United States of America, is appellee, as full, true and complete as the originals of the same now remain in my office.

I, further certify, that the pages of the typewritten record numbered from 1 to 18 are identical with the typewritten record upon which said cause was heard and decided in the said Court of Appeals. The transcripts of record on former appeals Nos. 16068 and 15295 were used by this Court in the hearing and decision of said cause and are separately certified.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit this 11th day of December, A. D., 1957.

Edward W. Wadsworth, Clerk, United States Court of Appeals for the Fifth Circuit.

[fol. 311] In United States Court of Appeals for the Fifth Circuit

The President of the United States of America

To the Honorable the Judge of the United States District Court for the Middle District of Alabama, Greeting:

Whereas, lately in the United States District Court for the Middle District of Alabama, before you, in a cause between United States of America, plaintiff, and Johnny Ray Smith, defendant, Criminal No. 1605, wherein the judgment of the District Court entered in said cause on the 29th day of March, A. D., 1957; was in favor of plaintiff, United States of America, and against defendant, Johnny Ray Smith, as by the inspection of the transcript of record of the said District Court, which was brought into the United States Court of Appeals for the Fifth Circuit, by virtue of an appeal sued out by Johnny Ray Smith, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and fifty-seven, the said cause came on to be heard before the said United States Court of Appeals, on the petition filed by appellant for a writ of mandamus and on the said transcript of record, and was argued by counsel:

On Consideration Whereof, It is now here ordered and

adjudged by this Court that the judgment of the said District Court appealed from in this cause and the denial of application for habeas corpus be, and the same are hereby, affirmed; and that the alternative writ of mandamus be, and it is hereby, denied.

"Rives, Circuit Judge, dissenting."

November 21, 1957.

[fol. 312] You, Therefore, Are Hereby Commanded that such execution and further proceedings be had in said cause as according to right and justice, and the laws of the United States ought to be had, the said appeal notwfthstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the 9th day of January. , in the year of our Lord one thousand nine hundred and fifty-eight.

Edward W. Wadsworth, Clerk, U. S. Court of Appeals for the Fifth Circuit.

[Endorsed:] No. 16708, United States Court of Appeals for the Fifth Circuit, October Term, 1957. Johnny Ray Smith, Appellant, vs. United States of America, Appellee. Mandate.

[fol. 313] Supreme Court of the United States, October Term, 1957

No. 417 Misc.

Johnny Ray Smith, Petitioner,

vs.

United States of America

On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Order Granting Motion for Leave to Proceed In Forma Pauperis and Granting Petition for Writ of Certiorari

June 9, 1958

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed

in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1056.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.